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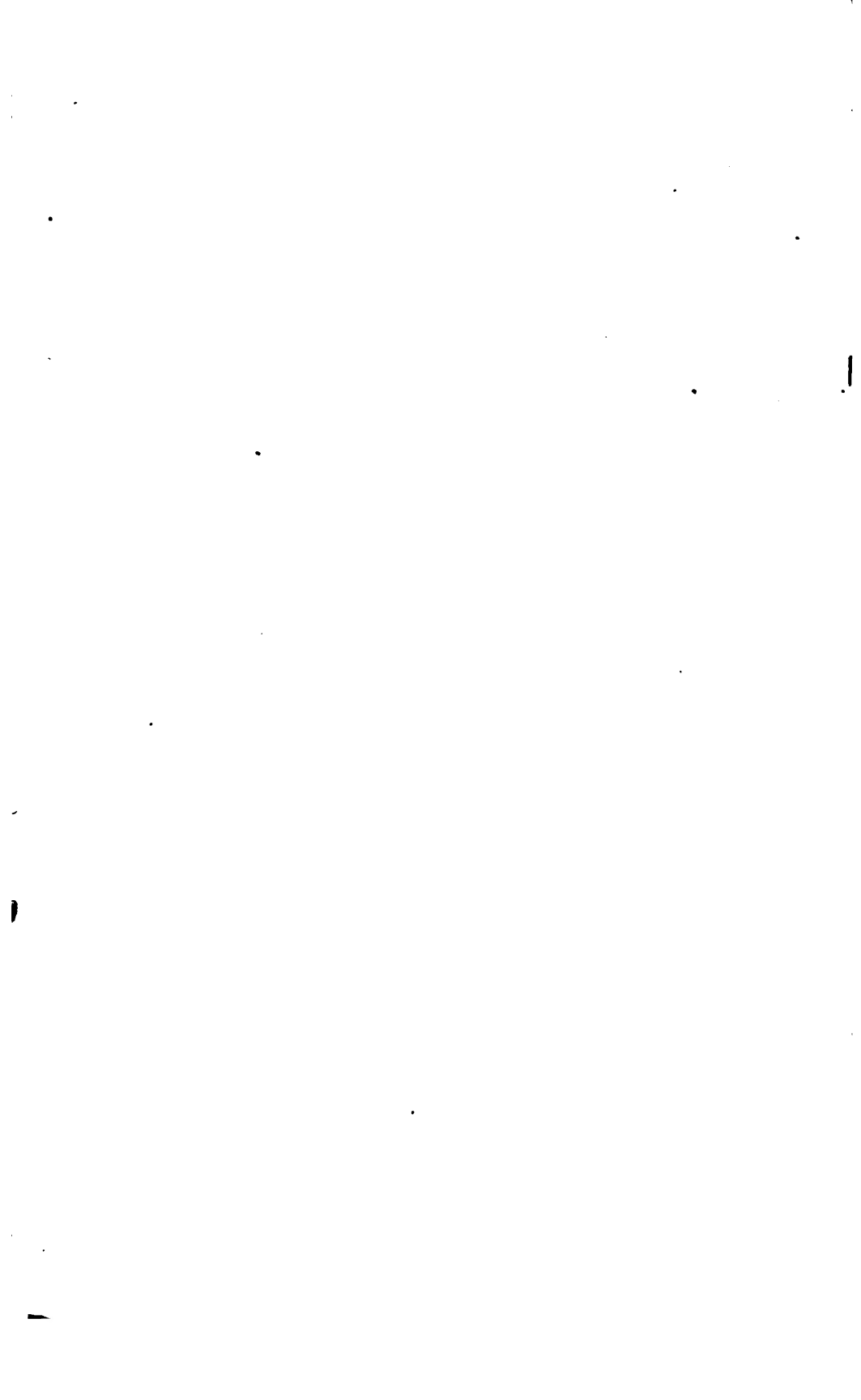


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ABBREVIATIONS USED.—c, criticised; d, dis-
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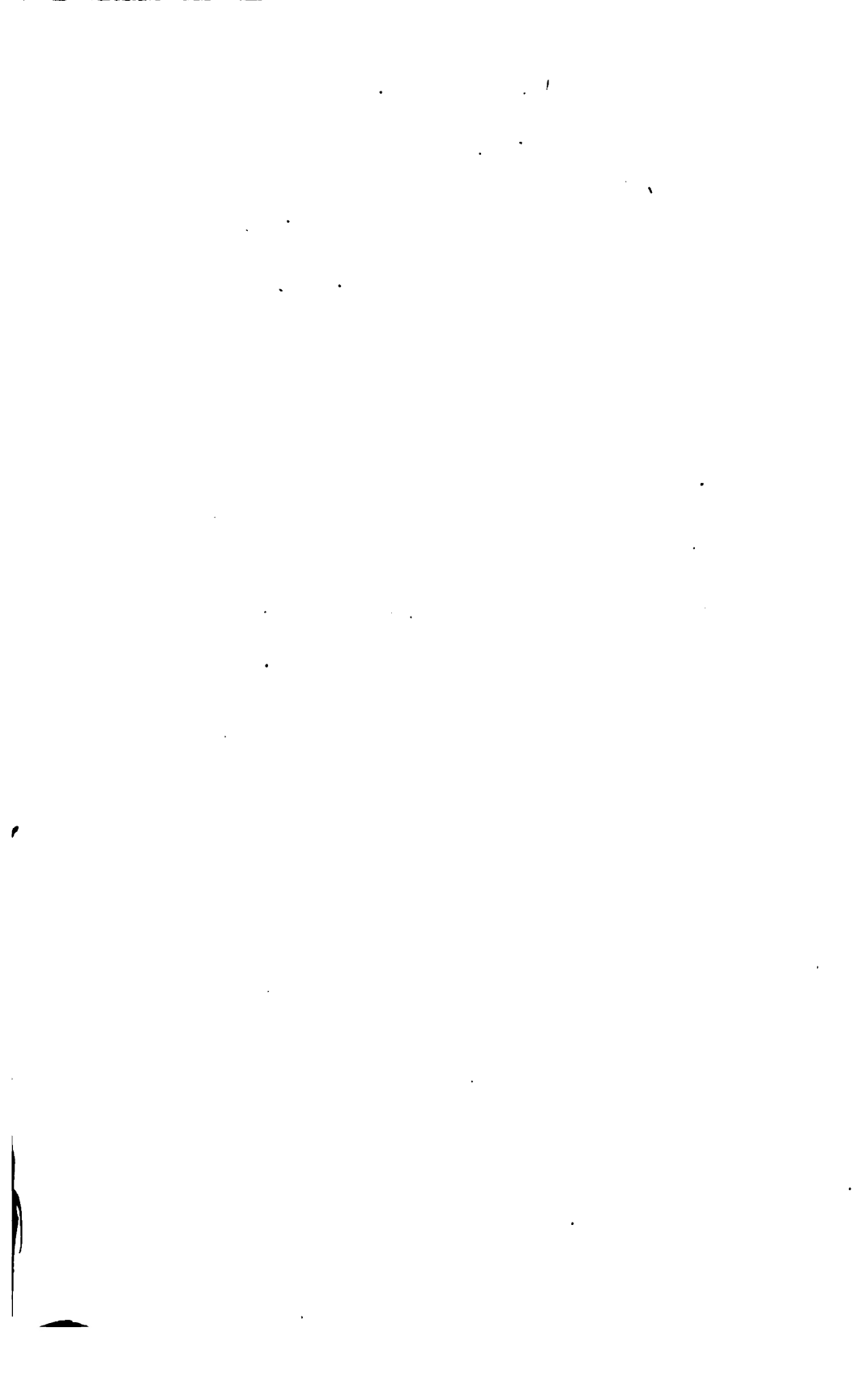
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DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF OCTOBER 4, 1887, TO AND
INCLUDING DECISIONS OF JANUARY 17, 1888.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,

STATE REPORTER.

VOLUME CVII.

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1888.

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ROBERT EARL,
GEORGE F. DANFORTH,
FRANCIS M. FINCH,
RUFUS W. PECKHAM,
JOHN C. GRAY, †

ASSOCIATE JUDGES.

* Died December 28, 1887.

† Appointed January 22, 1888, *vice* Charles A. Rapallo, deceased.



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**THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
AMARIAH H. BRADNER, Appellant.**

It seems that where the record on appeal in a criminal action from a judgment of a court of general jurisdiction discloses upon its face that the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded, or that there was some other fundamental defect in the proceeding which could not be waived or cured, it is the duty of the appellate tribunal to reverse, although the question was not formally raised in the court below and is not presented by any ruling or exception on the trial.

Where an indictment is found in a court of Oyer and Terminer, to give jurisdiction to the Court of Sessions to try it, there must be an order of the Oyer and Terminer remitting it to the Sessions for trial.

To sustain, however, upon appeal, a judgment of the Court of Sessions on trial of such an indictment, it is not essential that the record should affirmatively show that such an order was made; in the absence of proof to the contrary this will be presumed. The Court of Sessions is a superior court and its jurisdiction is presumed.

Frees v. Ford (6 N. Y. 176) distinguished.

The distinction between limitation of jurisdiction and inferiority of jurisdiction pointed out.

The history of Courts of Sessions given.

It seems that an arraignment and plea are necessary, preliminary to a legal trial upon an indictment. (Code Crim. Pro., §§ 296, 310.)

A formal plea of not guilty, however, is not necessary to put the defendant on trial; a demand of trial by him is equivalent to such a plea.

The record herein stated that "defendant on arraignment pleaded not guilty," and that thereafter, by leave of the court, he withdrew his plea and moved

Statement of case

to dismiss the indictment. The record then contained the decision of the court denying the motion; a statement of the proceedings and evidence on trial, which showed that defendant was present with his counsel and took part in the trial; also, the finding of a verdict of guilty. *Held*, it was to be inferred that all parties regarded the plea as withdrawn for the purpose of the motion only, and that it was reinstated when the motion was denied.

A motion for a new trial in a criminal action, on the ground of newly discovered evidence, can only be granted where the motion is made before judgment. (Code of Crim. Pro., §§ 468, 466.)

The omission of the clerk in his entry of judgment in a criminal action to state the offense for which the conviction was had, as required by the Code of Criminal Procedure (§ 495), does not render the sentence void. The defect is amendable; and, upon appeal to this court, other parts of the record may be referred to, and if they furnish evidence of the fact so omitted in the entry, the court may conform the entry to the fact. (§ 543.)

As to whether, in order to justify the detention of a defendant under said Code (§ 496), it is necessary that the entry in the minutes, with a copy of which he is to be furnished, should show the offense, *quære*.

(Argued June 28, 1887: decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made April 19, 1887, which affirmed a judgment of the Court of Oyer and Terminer of the county of Livingston, entered upon a verdict convicting the defendant of the crime of grand larceny, and which denied a motion for a new trial. (*Mem.* of decision below, 44 Hun, 233.)

The material facts are stated in the opinion.

Joseph W. Taylor for appellant. The defendant having been arraigned and never having pleaded to the indictment, the whole trial is a nullity. (Code of Crim. Pro., §§ 296, 297, 298, 299, 308, 309, 332, 333, 334, 342, 344, 345, 532, 538; *Maurer v. People*, 43 N. Y. 1; 4 Black. Com., 322, 332; Bishop Crim. Pro., § 648; 3 Whart. Crim. Law, § 3154; 2 Arch. Crim. Law, § 418; 2 Hale's Pleas of the Crown, 217; Roscoe's Crim. Ev. [7th ed.] 194; *R. v. Fox*, 10 Cox Cr. C. 502; *U. S. v. Riley*, 5 Blatch. 204; *U. S. v. Borger*, 19 id. 250; *Hoskins v. People*, 84 Ill. 87; *Johnson v. People*, 22 id. 314; *Yundt v. People*, 65 id. 372; *Gould v. People*, 89 id. 216; *Ayles v.*

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People, 65 id. 301; *Jenkins v. State*, 10 Ind. 140; *Graeter v. State*, 54 id. 159; *Tindall v. State*, 71 id. 314; *Weaver v. State*, 83 id. 289; *U. S. v. Gilbert*, 2 Sumn. 67-70; *Hill v. State*, 1 Yerg. [Tenn.] 76; *Link v. State*, 3 Heisk. [Tenn.] 252; *Douglas v. State*, 3 Wis. 820; *Davis v. State*, 38 id. 487; *State v. Saunders*, 53 Mo. 234; *State v. Montgomery*, 63 id. 296; *McQuillen v. State*, 8 S. & M. 595; *Sartorious v. State*, 24 Miss. 602; *Wilson v. State*, 42 id. 639; *Jacobs v. Comm.*, 5 S. & R. 317; *Dougherty v. Comm.*, 69 Penn. St. 286; *Grigg v. People*, 31 Mich. 471; *Sperry v. Comm.*, 9 Leigh, 623; *State v. Lartigue*, 6 La. An. 103; *Davis v. State*, 39 Md. 383; *People v. Corbet*, 28 Cal. 328; *People v. Gaines*, 52 id. 479; *Hayes v. State*, 58 Ga. 46; *State v. Hughes*, 1 Ala. 655; *Younger v. State*, 2 W. Va. 579; *Burley v. State*, 1 Neb. 385; *Preuit v. State*, 5 id. 377; *Meacham v. Austin*, 5 Day, 236; *Ray v. People*, 6 Cal. 234; *Gaither v. State*, 8 Crim. L. M. 754; *Cancemi v. People*, 18 N. Y. 136; *Vose v. Cockcroft*, 44 id. 422; *Blend v. People*, 41 id. 606; *Shaw v. People*, 3 Hun, 280; *Grigg v. People*, 31 Mich. 471; Code Crim. Pro., § 485; *Messner v. People*, 45 N. Y. 1.) The judgment entered in Livingston county and affirmed by the Supreme Court is wholly insufficient. (Code Crim. Pro., §§ 37, 39, 144, 268, 272, 485.) It is insufficient because it does not state, briefly or otherwise, any offense for which a conviction has been had. (Penal Code, § 566; Laws of 1886, chap. 593.) If the conviction is for false pretenses, the sentence is in excess of that allowed by law, three years. (Penal Code, § 566; Code Crim. Pro., § 486.) The Court of Sessions of Livingston county had no jurisdiction to try the indictment. (Code Crim. Pro., § 37, tit. 5, chap. 1; id. § 39.) The minutes of the trial should show the adjournments of the court during the trial, and all proceedings properly forming part of the trial. (Code Crim. Pro., §§ 415, 485.) The return should show that the defendant was personally present during the trial. (*Maurer v. People*, 43 N. Y. 1; Code Crim. Pro., § 356; *Stephens v. People*, 19 N. Y. 549; *Graham v. State*, 40 Ala. 659; *Hamilton v. Comm.*, 16 Penn. St. 129; *Jeffries v. Comm.*, 12 Allen, 145; *State v. Able*, 65

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Mo. 37.) The refusal of the Court of Sessions to grant the motion to vacate the judgment on the ground of want of power was erroneous. (Code Crim. Pro., § 466; *Quimbo Appo v. People*, 20 N. Y. 543; *Ex parte Lange*, 18 Wall. 178.) The sentence having been partly executed, the Court of Sessions has lost all control over its judgment, and can neither modify it nor amend the record. (*Ex parte Lange*, 18 Wall. 178.)

George W. Daggett for respondent. It was for the jury to decide whether the testimony of Barbara Leiter should be believed. (*Quincy v. Young*, 5 Daly, 327; *McCall v. Moschowitz*, 1 N. Y. 115; *People v. Jones*, 3 id. 252.) The General Term could not entertain a motion for a new trial on the ground of newly discovered evidence made after judgment. (Code Crim. Pro., §§ 462, 466; *People v. Hovey*, 1 N. Y. Cr. R. 324, 471.)

ANDREWS, J. The defendant was indicted at the Oyer and Terminer, in the county of Livingston, for grand larceny, in obtaining from one Barbara Leiter the sum of \$1,500 by means of a check for that amount, which he induced her to sign under the false pretense that it was a check for the sum of \$100. (Penal Code, 528.) The indictment was found May 4, 1885, and the trial thereon was had in the Court of Sessions of Livingston county, commencing April 28, 1886, and resulted in the conviction of the defendant, who was thereupon sentenced by the court to imprisonment in the State prison for the term of five years. The principal questions presented on this appeal do not arise upon any ruling made on the trial, or in any proceeding subsequent to the trial. They are questions raised on the record alone, and which were not, in any way, called to the attention of the trial court. If the record discloses upon its face that the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded (*Cancemi's Case*, 18 N. Y. 128), or some other defect in the proceedings, which could not be waived or cured and is fundamental, it would, as we conceive, be the duty of

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an appellate tribunal to reverse the proceedings and conviction, although the question had not been formally raised in the court below, and was not presented by any ruling or exception on the trial. We are of opinion, however, that no errors of this character are disclosed in the record before us.

It is insisted that the Court of Sessions had no jurisdiction to try the indictment, for the reason that there was no order of the Oyer and Terminer remitting the indictment to that court for trial. There can be no doubt that such an order was essential to confer jurisdiction upon the Court of Sessions to try the indictment. The power of the Oyer and Terminer to remit indictments pending therein to the Court of Sessions for trial, and conversely, of the Court of Sessions to remit indictments from that court to the Oyer and Terminer, existed under the Revised Statutes and is continued under the present procedure. (Code Crim. Pro. §§ 39, 41.) The only exception is of indictments for crimes punishable with death, which may be found in either court, but are triable only in the Oyer and Terminer. The record in this case is silent as to the existence or non-existence of an order remitting the indictment in question to the Sessions. It does not state whether such an order was made or not. But there is nothing in the record which justifies an inference, as matter of fact, that the indictment was not regularly sent by the Oyer and Terminer to the Sessions. The bare fact that no order appears in the record does not show that an order was not made. The omission may have resulted from inadvertence in making up the record. The question is, therefore, presented, whether, in order to the validity of the judgment rendered, the record must affirmatively show that the Sessions acquired jurisdiction by virtue of an order of the Oyer and Terminer remitting the indictment.

In the argument in *Peacock v. Bell* (1 Saund. 73), the rule of jurisdiction is said to be "that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged;" and this statement of

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the rule has been frequently approved. "Superior courts," says the learned annotator of Smith's Leading Cases (1 S. L. C. 991) "are presumed to act by right, and not by wrong, and their acts and judgments are consequently conclusive in themselves, unless plainly beyond the jurisdiction of the courts from which they emanate;" and many cases are cited in support of this statement. Indeed, the general doctrine thus stated is nowhere controverted, but, in applying the rule, it must first be determined whether the court whose judgment is in question is to be regarded as a superior or inferior court, and, therefore, entitled or not, as the case may be, to the benefit of the presumption of jurisdiction. There is a qualification of the general rule stated in *Saunders*, to be found in some of the cases, depending upon the fact whether the question of jurisdiction arises collaterally, or in a direct proceeding in error, to review the judgment. There is also another inquiry which has given rise to much debate, and that is, whether jurisdictional facts shown by the record of a judgment of a court of general jurisdiction to exist, can be controverted. That question received great consideration in this court in the case of *Ferguson v. Cranford* (70 N. Y. 253). The present case presents simply the question of presumption as applied to the judgment under review, the record being silent, neither affirming nor denying the existence of the jurisdictional fact in controversy. There is a well-settled distinction between limitation of jurisdiction and inferiority of jurisdiction. Every court is subject to some limitation of jurisdiction, territorial or otherwise. No court can act without the boundaries of the jurisdiction by which it is created. Courts of equity and common law courts, when separately constituted, are confined each to its appropriate sphere. The Circuit and District Courts of the United States exercise a limited jurisdiction and are subject to have their judgments reviewed by another tribunal, but they are not inferior courts within the rule in *Saunders*, and jurisdiction of their proceedings and judgments is presumed, at least, where assailed collaterally. (*Ruckman v. Cowell*, 1 N. Y. 505; *Cheanung*

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Bank v. Judson, 8 id. 254.) Courts of Sessions in counties are not inferior courts in a technical sense. Their origin dates far back in the colonial period. Courts of Sessions were established in each county in the province of New York, by the "act to settle Courts of Justice," passed in 1683, with general criminal and civil jurisdiction (see Rev. Laws, 1813, App.), and they have been continued from that date to this as criminal courts in each of the counties of the State. Their jurisdiction (under the name of General Sessions of the Peace), as defined by the Revised Statutes (2 R. S. 208, § 5), extended to make inquiry by a grand jury of all crimes committed or triable in the county, and to the trial and punishment of all crimes not punishable by death or by imprisonment in the State prison for life. The Code of Criminal Procedure has removed one of the restrictions in the Revised Statutes, so that all crimes are now triable in Courts of Sessions, except crimes punishable with death, and has, in other respects, extended and enlarged their powers (§ 39). During the whole history of the State, Courts of Sessions have exercised a very extensive jurisdiction in criminal cases, and we can perceive no reason why their judgments are not entitled to every presumption attaching to courts of enlarged and general jurisdiction. The court is presided over by a judge learned in the law. It acts through a grand and petit jury and proceeds according to the course of the common law. It determines all questions of personal liberty affected by crime, and is only precluded from trying indictment for crimes punishable with death. The accused has the benefit of counsel, the decisions of the court are subject to review, and all the safeguards designed for the protection of persons accused of crime attend its proceedings. We think it would be difficult to assign any valid reason why the same presumption of regularity and jurisdiction should not be indulged to uphold the judgment of a Court of Sessions, as is indulged in in respect to judgments of the Oyer and Terminer, or why, if the present appeal was from a conviction at the Oyer and Terminer on an indictment found at the Sessions, a presumption that the indictment had

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been duly remitted, should be indulged in the one case and not in the other. *Foot v. Stevens* (17 Wend. 483) was an action of debt on a judgment of the Court of Common Pleas of the county of Genesee. The record did not show that the court had acquired jurisdiction of the person of the defendant, and it was objected that the judgment was void. The court overruled the objection and on motion for a new trial it was held that Courts of Common Pleas, although relatively inferior courts, and subject to the control of the Supreme Court by *mandamus*, *certiorari*, etc., were to be regarded as courts of general jurisdiction, and that when nothing to the contrary appears, it will be intended in support of a judgment therein that the court had jurisdiction of the person, although not averred in the record. The same question was decided in the same way in *Hart v. Seixas* (21 Wend. 40) on error from a judgment of the New York Common Pleas, and a reversal was sought on the ground that the record did not show that the court had acquired jurisdiction of the person of the defendant. The prevailing opinion was pronounced by COWEN, J., affirming the judgment, and it was held, that the fact that the question arose on error and not collaterally as in *Foot v. Stevens*, made no difference, and that the presumption attached alike in the one case as in the other. The case of *Hart v. Seixas* has been questioned (1 Smith's Leading Cases, 1021) as carrying the doctrine of presumption somewhat beyond its legitimate boundaries, but the case has been frequently cited in our reports with approval, and has never been overruled, and must be regarded as authoritative in our courts. (See *Chemung Canal Bk. v. Judson*, *supra*.) In *Frees v. Ford* (6 N. Y. 176) it was held that County Courts organized under the Constitution of 1846, are courts of special and limited jurisdiction, whose jurisdiction must appear on the face of their judgments, and will not be presumed. The Constitution of 1846 (Art. 6, § 14) declares that "the County Court shall have such jurisdiction in cases arising in Justice's Court and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases." The decision in *Frees v. Ford* had refer-

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ence to a court constituted under this limited and circumscribed power, and is not an authority applicable to a court possessing the broad and comprehensive powers of a Court of Sessions. The conclusion we have reached on the point of jurisdiction accords, we think, with the spirit of the authorities and is reasonable in itself. It can scarcely be doubted that as matter of fact the proper order remitting the case to the Sessions was made. Indeed it is so stated in one of the affidavits on the part of the defendant, made on a motion for a new trial. The indictment was treated by all parties as properly in the Sessions, and was tried without objection upon that assumption.

The learned counsel for the defendant raises the further objection that the defendant was not arraigned and did not plead to the indictment. The authorities are quite numerous to the effect that in a criminal case an arraignment and plea are essential and necessary preliminaries to a legal trial upon an indictment. (4 Black. Com. 322; Bishop's Crim. Pro. § 684; 3 Wharton's Crim. Law, § 3154.) Section 296 of the Code of Criminal Procedure declares that when the indictment is filed the defendant must be arraigned thereon. The defendant on arraignment may either demur or plead to the indictment (§ 321) and the plea makes the issue of law or fact to be tried. The object of the arraignment is to inform the defendant of the charge against him and have him answer the indictment. (4 Black. Com. 322.) A formal plea of not guilty is not necessary to put the defendant on trial. Under the Revised Statutes (2 R. S. 730, § 70) a demand of trial by a defendant was declared to be equivalent to a plea of not guilty. It is sufficient, we think, to constitute an issue that the defendant on his arraignment informs the court that he denies the charge or that he demands a trial. We are of opinion that the record in this case does sufficiently show an arraignment and plea. The record states that on May 13, 1885, the "defendant on arraignment pleaded not guilty." The record then proceeds "subsequently and after arraignment as aforesaid, the defendant by leave of the court

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withdrew his plea and moved the court to dismiss the indictment under subdivision 2, section 313, Code of Criminal Procedure." Then follows the affidavits on which the motion to dismiss was made, and the decision of the court denying the motion; also a statement of the proceedings and evidence on the trial, and the finding by the jury of a verdict of guilty. It does not appear that there was a formal renewal of the plea of not guilty. But the parties proceeded as upon the trial of that issue. The defendant was present with his counsel and cross-examined the witnesses for the plaintiff, and introduced witnesses in his defense. It is a just inference that all parties regarded the plea as having been withdrawn for the purpose of the motion only, and proceeded to the trial on the understanding that it was reinstated when the motion was denied. The Code declares that "no indictment is insufficient, nor can the trial judgment or other proceedings thereon be affected by reason of any imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendants upon the merits." (Code of Crim. Pro. § 285.) It would be sacrificing substance to form not to give effect to the transaction according to the plain understanding of the court and the parties.

Exceptions were taken by the defendant on the trial to the admission and rejection of evidence. They were fully considered by the General Term and none of them presents any doubtful or difficult question.

The defendant, after judgment, applied to the trial court to vacate the judgment to enable him to move for a new trial on the ground of newly discovered evidence. The court denied the motion on the ground that it had no power to grant the same. The power of a trial court to grant a new trial, given by section 463 of the Code of Criminal Procedure, is qualified by section 466, which declares that "the application for a new trial must be made before judgment." The affidavits upon which the motion was made, did not make a case upon which, within the established rule, a new trial could be granted. We think the application was improperly denied.

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The final question in the case relates to the form of the judgment entered by the clerk in the minutes. The record contains (1) a copy of the indictment; (2) an arraignment and plea; (3) the proceedings on the motion to dismiss; (4) the minutes of the trial, including a statement of the finding by the jury of the verdict of guilty, and entries of various adjournments for the purpose of permitting the defendant to move for a new trial; (5) the affidavits read on the motion; (6) an entry entitled "*The People v. Amariah H. Bradner*," which is the minute of the judgment. This last entry recites the hearing of the motion for a new trial, its denial by the court, and then proceeds, "the said defendant being asked if he had any legal cause to show why judgment should not be pronounced against him, to which he answered, 'No', it is ordered on this 8th day of June, 1886, that the defendant be imprisoned in the State prison at Auburn, N. Y., for the term of five years." Section 485 of the Code of Criminal Procedure provides that "when judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had, and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment-roll," etc. The judgment in a criminal case upon conviction is the sentence of the court. But it is essential for certainty and for the protection of all parties that it should be evidenced by a record. There must be a memorial of the judgment entered in the record of the court before the judgment can be executed. Section 485 does not contemplate the making up of a formal judgment record. The entry in the minutes stands as the record of the judgment, and, on appeal, this entry forms a part of the judgment-roll. The entry in this case does not fully conform to section 485, as it contains no statement of the offense of which the defendant was convicted. Looking at the whole record, which includes the indictment and the minutes of the trial, the fact appears. The question is whether this omission in the entry by the clerk makes the sentence void, so that the case stands

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as if no judgment had been pronounced, or may the other parts of the record be referred to, and, if found to furnish evidence of the fact omitted in the entry, may this court conform the entry to the fact. Section 486 of the Code requires that where a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the minutes shall be furnished to the officer whose duty it is to execute the judgment, and declares that no other warrant or authority is necessary to justify or require its execution. We are not called upon to decide whether it is necessary, in order to justify a detention of a defendant under this section, that the entry in the minutes, with a copy of which he is to be furnished, should conform to the requirements of section 485, and show the offense of which the defendant was convicted. But we are of opinion that the defect in the entry is amendable on this appeal. By section 542 (Code Crim. Pro.) the court on appeal is required to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. Section 543 declares that, "upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered on a lawful verdict, correct the judgment to conform to the verdict; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal may, if necessary or proper, order a new trial." In this case the verdict and sentence were lawful, but a defective record of the judgment has been made. It may, we think, be regarded as an erroneous judgment within this section. The verdict authorized an entry of the judgment in accordance with section 483, but by negligence or inadvertence the statement of the offense was omitted, and if the entry is amended according to the truth as shown by other parts of the record, the judgment, as recorded, will conform to the verdict. It may be admitted that the primary object of section 543, was to provide for cases where an illegal sentence followed a lawful conviction, but still, we think the language and intent of the section fairly includes the present case.

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The judgment should, therefore, be amended, by inserting a statement of the offense for which the conviction was had, and, as so amended, affirmed.

All concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
LORENZO DIMICK, Respondent.

One count of an indictment for larceny charged, in substance, that the defendant, with intent to deprive a marine insurance company, of which his firm was the agent, of its property, and to appropriate the same to his own use, or that of some person or body corporate unknown, feloniously, falsely and fraudulently represented to said company that it had, through his firm, insured the cargo of a vessel, in the sum of \$5,000, for the benefit of some person or body corporate unknown; that a loss had occurred whereby the company had become legally liable to pay the amount of the insurance, and that, believing such representations to be true, the company did, at the city of Buffalo, pay over and deliver to the defendant the sum of \$4,975, whereas, in truth, the company had made no such insurance, and each and every of the representations were false, fraudulent and untrue, and the defendant "well knew such was the case." Defendant demurred to the indictment upon the ground that it did not conform to the requirements of the provisions of the Code of Criminal Procedure (§§ 275, 276, 284, 285), prescribing the form of an indictment. The defects specified were that it did not sufficiently charge the offense, because it did not state what the perils and risks were, which the defendant represented were insured against, or that he represented that a loss had occurred from a peril against which the company had insured, or that defendant represented that any person was insured, or that he knew of the falsity of the representations; also, that the property was not sufficiently described. *Held*, that the demurrer was properly overruled; also that, whether the representations made in the indictment were calculated to deceive, or capable of so doing, was a question of fact for the jury.

The indictment contained two other counts, one of which charged that defendant, in his firm name, drew upon the general agent of said company, duly authorized by it to pay in case the drawer was lawfully entitled to draw the draft, for \$4,975, when defendant and his firm, to his knowledge, were not lawfully entitled to draw for that or

107	18
162	589

107	18
162	581

107	18
164	144
164	145

107	18
168	7841
168	7850

107	13
173	10401

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any other sum, and by color and aid of such draft he obtained of it the sum specified. The other count charged defendant, in substance, with secreting, withholding, taking and carrying away from the possession of said company, the true owner, the sum of \$4,975, and appropriating the same to his own use, or to that of some person or body corporate unknown. It was objected that the indictment was defective in charging more than one crime contrary to the Code of Criminal Procedure (§§ 278, 279). *Held*, untenable; that the indictment simply charged, in separate counts, as committed by different means, the same crime, larceny. (§§ 528, 529.)

Upon the trial of the indictment McD., the general agent upon whom the draft was drawn by defendant, was called as a witness by the People. On cross-examination he was questioned as to a civil action commenced by the insurance company against defendant, in which he had verified the complaint. He was asked what he swore to as to a particular matter, and gave answers showing that the complaint contained an allegation somewhat at variance with his testimony on direct-examination. After redirect-examination the district attorney offered in evidence a copy of the complaint. The court received it in evidence for the purpose of showing what the witness had sworn to, stating that it could not "be evidence upon any other point." The complaint contained thirteen counts, only one of which related to the matter inquired of on cross-examination. *Held*, that the ruling was not error; that, while the whole complaint was not competent, the district attorney had the right to prove the whole and to read so much of it as related to the cross-examination, and which tended to explain or qualify the testimony so elicited; and that a fair construction of the ruling of the trial judge was that he received the complaint only for the purpose of showing what McD. had testified as to the matter inquired of upon the cross-examination.

Even if a single phrase of the charge of a court in a criminal action, isolated from the rest of the charge, is found to be erroneous, the judgment should not, on that account, be reversed, if the whole charge properly instructed the jury, and it can be seen, with reasonable certainty, that the erroneous portion did not mislead the jury or influence the verdict.

Marine insurance may lawfully be effected upon property "lost or not lost," but that phrase in a policy always has reference to cases where property has started upon its voyage and the parties have no knowledge as to whether it has been lost or not. In case the property has, to the knowledge of the parties, been lost, there can be no valid or lawful insurance. On appeal from an order of reversal in a criminal action, the defendant, for the purpose of sustaining the reversal, has the right to rely not only upon the grounds on which the reversal was based in the court below, but upon any error to be found in the record.

The evidence showed that defendant's firm had the agency in Buffalo for four insurance companies, one of them the C. Ins. Co.; that he insured the cargo in question in that company, but after he was

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advised of the loss changed it to one of the other companies. The People were allowed to give evidence, under objection and exception, that defendant had during the same season, in several instances after knowledge of a loss, insured against in the C. Co., changed the insurance to one of the other companies for the purpose of shielding the C. Co. *Held*, no error; that the evidence was proper on the question of motive and intent; also that, although the proof as to the other crimes was inconclusive, the People had the right to give it and have it submitted to the jury with proper instructions.

The evidence showed that defendant drew upon McD., at New York, for the sum stated in the indictment; at three days sight; that the draft was sent to a bank in that city, and by it presented to McD., who paid it by giving a check upon another bank. It was claimed by defendant that the proof did not sustain the indictment, in that it charged that he obtained "money" by the fraud alleged, while the proof showed that the company parted with a draft instead of money. *Held*, untenable; that the bank presenting the draft must be deemed to have been defendant's agent, and payment to it was payment to him, and the bank upon which the check was drawn was to be treated as the agent of the insurance company in making the payment; and so, money was paid to defendant.

It was further objected on the part of defendant that the conviction was erroneous as the proof failed to show that the crime was committed in Buffalo. *Held*, untenable; that it was partly committed in that city and partly in New York, and so the case came within the provision of the Code of Criminal Procedure (§ 184), declaring that "when a crime is committed partly in one county and partly in another * * * the jurisdiction is in either county."

The indictment was found in the Superior Court of Buffalo. It was claimed by defendant that, under the provision of said Code, defining the jurisdiction of that court (§ 28), which declares that it may inquire "by a grand jury of all crimes committed in the city of Buffalo," and may "try and determine all indictments found therein, or sent there by another court, for a crime committed in that city," the said court had no jurisdiction. *Held*, untenable; that the grand jury was clothed with power to determine both the facts and the law, and as it did inquire and determine that the crime was committed in the city of Buffalo there was no way of reviewing its determination unless by motion to quash the indictment or to arrest judgment; that under the plea of not guilty the only question was as to defendant's guilt and the jurisdiction of the court to try that question.

It is the duty of an appellate court to give, in a criminal action, with reason and discretion, full force and effect to the provision of the said Code (§ 542), declaring that "after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties," and the one

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which provides (§ 684) that "neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid unless it has actually prejudiced the defendant."

(Argued June 28, 1887· decided October 4, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made October 22, 1886, which reversed a judgment of the Superior Court of the city of Buffalo, entered upon a verdict convicting the defendant of the crime of grand larceny.

The defendant was indicted in the Superior Court of the city of Buffalo, in April, 1884. The indictment contains three counts; and the first count charges, in substance, that on the 10th day of October, 1883, the defendant, with intent to deprive and defraud the true owner of its property and the use and benefit thereof, and to appropriate the same to the use of the defendant or of some person or body corporate unknown, did feloniously, falsely and fraudulently pretend and represent to the Thames and Mersey Marine Insurance Company, a body corporate, that said company had theretofore made and effected through the firm of Crosby & Dimick, composed of Thomas G. Crosby and the defendant, certain insurance upon the cargo of the schooner James Wade, whereby it had insured the cargo of the said schooner for the benefit of some person or body corporate unknown in the sum of \$5,000, and that a loss had theretofore, and after the making of the said insurance, occurred on the cargo of the vessel, whereby the liability of the said company had accrued and become fixed in the sum of \$5,000, and that the said company was legally liable to pay said loss to the said Thomas G. Crosby and the defendant for the benefit of some person or body corporate unknown entitled to the same; that the company believing such representations to be true, and relying on the same, were thereby induced to, and did, at the city of Buffalo, on the 10th day of December, 1883, pay over and deliver to the defendant, and the defendant did then and there obtain from the possession of the company by color and

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aid of such representations, with intent to deprive and defraud the true owner thereof and appropriate the same to his own use, and to the use of some person or body corporate unknown, the sum of \$4,975, of which the company was the true owner, and to the use and benefit of which it was entitled; that the company had not theretofore made and effected any such insurance upon the cargo of said schooner through the firm of Crosby & Dimick, or otherwise; that no such loss had occurred upon the cargo of said vessel for which the company was liable to pay any sum of money whatever; that it had not become liable to pay any sum or moneys whatever upon any loss whatever upon the cargo of said schooner by reason of any insurance made or effected through its agents or through the defendant, or otherwise; that, in fact, each and every one of the pretenses and representations were wholly false, fraudulent and untrue, as the defendant then and there well knew.

The second count charged that on December 10, 1883, at the city of Buffalo, the defendant drew upon Angus J. McDonald, the general agent of the Thames and Mersey Marine Insurance Company, and duly authorized by it to pay the same from its money, in case the drawer thereof was then and there lawfully entitled to draw upon him for payment of the same, a certain draft in the name of Crosby & Dimick for the sum of \$4,975, to the order of Crosby & Dimick, when, in truth and in fact, the defendant and said firm were not lawfully entitled to draw upon the drawee therein named for that or any other sum, and the defendant knew such to be the case; and the defendant did then and there, with intent to defraud such insurance company by color and aid of such draft, obtain from it the sum of \$4,975. In the third count it charges, in substance, the defendant with secreting, withholding, taking, stealing and carrying away from the possession of the true owner, the Thames and Mersey Insurance Company, the sum of \$4,975, and appropriating the same to his own use, or to the use of some person or body corporate unknown.

The defendant demurred to the indictment as follows; (1.) "That the indictment does not conform substantially to the

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requirements of sections 275 and 276 of the Code of Criminal Procedure, in that it does not contain a plain and concise statement of the act constituting the alleged crime without unnecessary repetition, nor does it set forth the act charged as an offense;" (2.) "that more than one crime is charged in the indictment within the meaning of sections 278 and 279 of said Code;" (3.) "that the facts stated do not constitute a crime."

The indictment was thereafter moved into the Court of Oyer and Terminer where the demurrer was overruled, and the defendant pleaded to the indictment. Subsequently the defendant was brought to trial, convicted and sentenced to the State prison for a term of five years. A motion for a new trial was made by the defendant before the judge who presided at the Oyer and Terminer and was denied.

Further facts are stated in the opinion.

George F. Quinby for appellant. Although the indictment contains three counts, it charges but one offense. (*People v. Willett*, 102 N. Y. 251; *Phelps v. People*, 72 id. 334; *People v. Conroy*, 97 id. 62; *People v. Rugg*, 98 id. 537; Code Crim. Pro. §§ 275, 276, 279, 283, 284, 285.) Should only one count be good, that would be sufficient to sustain a conviction. (*People v. Davis*, 56 N. Y. 95; *People v. Minken*, 36 Hun, 90; *People v. Willett*, 102 N. Y. 251.) The court committed no error in denying the motion to compel the district attorney to elect on which count of the indictment he proposed to proceed. (*Armstrong v. People*, 70 N. Y. 38; *Cook v. People*, 2 T. & C. 404; *Hawker v. People*, 75 N. Y. 487; Code Crim. Pro. § 279.) Section 527 of the Code of Criminal Procedure has no application to this court. No questions could be considered here except such as are presented by proper and sufficient exceptions, duly taken upon the trial. (*People v. Donovan*, 101 N. Y. 632; *People v. Hovey*, 92 id. 554; *People v. D'Argencour*, 95 id. 625; *People v. Guidici*, 100 id. 503.) All that is necessary for the purposes of the present case, and as to this defendant, is a *de facto* corporate existence, the defendant having contracted and dealt with it as a cor-

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poration and as the Thames and Mersey Marine Insurance Company (Limited). (*Whitford v. Laidler*, 94 N. Y. 151; *Bonner v. Appleby*, 1 Sandf. 158; *Palmer v. Lawrence*, 3 id. 161; *White v. Ross*, 15 Abb. Pr. 66; *White v. Coventry*, 29 Barb. 305; *Eaton v. Aspinwall*, 19 N. Y. 119; *Meth. E. Church v. Pickett*, id. 484; *Bk. of Toledo v. Internat. Bk.*, 21 id. 542; *Leonardsville Bk. v. Willard*, 25 id. 574; *B. & A. R. R. Co. v. Carey*, 26 id. 75, 77, 78; Bigelow on Estop. [4th ed. 1886] 528.) The rules of evidence in civil cases are applicable also to criminal cases. (Code Crim. Pro. § 392; *People v. Noelke*, 29 Hun, 461; 94 N. Y. 137; *People v. Beach*, 87 N. Y. 508, 512, 513; *Pontius v. People*, 82 id. 339, 346, 347; *People v. Buddensieck*, 103 id. 582; *Quinby v. Strauss*, 90 id. 664; *Daley v. Byrne*, 77 id. 187; *Bergham v. Jones*, 94 id. 51; *Fountain v. Pettee*, 38 id. 184, 185, 186; *Levin v. Russell*, 42 id. 251, 255.) It was competent to prove other similar frauds on the part of defendant. (*Pier-son v. People*, 79 N. Y. 424; *Pontius v. People*, 82 id. 339, 347; *People v. Everhardt*, 5 N. Y. 793; *Cary v. Hotailing*, 1 Hill, 311; *Bottomly v. U. S.*, 1 Story, 135; *Castle v. Bullard*, 23 How. [U. S.] 172, 186; *Butler v. Watkins*, 13 Wall. 456, 464; *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591.) The defendant's remedy, assuming that knowledge was not fairly brought home to him, was to renew the motion to strike out at the close of the trial, and then to ask the judge to instruct the jury to disregard the evidence. (*Gavtry v. Doane*, 51 N. Y. 84-90; *Platner v. Platner*, 78 id. 90, 101; *Pontius v. People*, 82 id. 339, 346, 347; *Miller v. Montgomery*, 78 id. 282-286; *Levin v. Russell*, 42 id. 251.) An excepting party must refer certainly, intelligibly and clearly to the portion of the charge excepted to. (*McGinley v. U. S. L. Ins. Co.*, 77 N. Y. 497; *People v. Buddensieck*, 103 id. 501.) If the charge, as a whole, conveyed to the jury the correct rule of law on a given question, the judgment will not be reversed, although detached sentences may be erroneous; and if the language employed is capable of different constructions, that construction will be adopted which

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will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been misled. (*Caldwell v. N. J. St't Co.*, 47 N. Y. 286; *People v. McCalam*, 103 id. 597; *People v. Buchanan*, 51 id. 492; *Crist v. E. R. Co.*, 58 id. 638, 639; *Sperry v. Miller*, 16 id. 413.) As the indictment charged but one offense, there could therefore be but one verdict, guilty or not guilty. It was to be the ordinary general verdict in a criminal case. (Code Crim. Pro., §§ 436, 437; *People v. Rugg*, 98 N. Y. 537.) When a crime is committed partly in one county and partly in another, or the acts or effects thereof constituting or requisite to the commission of the offense occur in two or more counties, the jurisdiction is in either county. (*Mack v. People*, 82 N. Y. 235, 237.) Where a question arises as to the proper construction of the words of contract, the practical construction adopted by the parties themselves, and their acts thereunder are entitled to great, if not controlling weight. (*Chicago v. Sheldon*, 9 Wall. 50, 54; *French v. Carhart*, 1 N. Y. 96, 102; *Beacham v. Eckhardt's Ex'rs*, 2 Sandf. Ch. 116; *Stone v. Clark*, 1 Met. 378, 381; *Lovejoy v. Lovett*, 124 Mass. 270, 274.) The policy in question is only the ordinary form of policy and the words "lost or not lost" contained in it, bear, in the absence of any thing to show the contrary, only the ordinary meaning, that the insurance or reinsurance could be effected only when it was not known whether the subject was lost or not. (*Ins. Co. v. Folsom*, 18 Wall. 251; *Buck v. Bark*, 18 N. Y. 337, 339, 342, 343; 1 Chitty on Cont. 106; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; *Blackburn v. Vigors*, 17 Q. B. D. 553 [1886.]) A judge is not bound to repeat his charge, nor is he bound to adopt the exact language of counsel in their request to charge. (*Tucker v. Ely*, 37 Hun, 565; *O'Connel v. People*, 87 N. Y. 377; *Moet v. People*, 85 id. 373, 380; *Raymond v. Richmond*, 88 id. 671.)

Spencer Clinton and *Daniel L. Lockwood* for respondent. The indictment does not conform substantially to the requirements of sections 275 and 276 of the Code. (*People v. Gates*,

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13 Wend. 317; *Briggs v. People*, 8 Barb. 551; *People v. Jackson*, 3 Denio, 101; *Phelps v. People*, 72 N. Y. 349; *King v. Cheer*, 4 B. & Cr. 902; 10 Eng. Com. L. 266.) The representations of the defendant, not being calculated or capable of deceiving could not constitute a crime. (*People v. Williams*, 4 Hill, 9; *People v. Oyer & Ter.*, 83 N. Y. 437-439; *People v. Wood*, 10 N. Y. Leg. Observer, 61; *People v. Gates*, 13 Wend. 311; *People v. Blanchard*, 90 N. Y. 314.) The indictment is defective in not describing the property taken. (*Haskins v. People*, 16 N. Y. 344, 347; *People v. Reave*, 38 Hun, 418; *Phelps v. People*, 72 N. Y. 350.) The indictment is defective in not charging more than one crime, contrary to sections 278 and 279 of the Code. (*People v. Ward*, 15 Wend. 231; *People v. Wynder*, 12 id. 425.) Where the case of the people rests upon circumstantial evidence, the circumstances must be consistent with no other hypothesis than that of guilt to sustain a conviction. (*People v. Bennett*, 49 N. Y. 13, 14; *Folsom v. Mer. Mut. Ins. Co.*, 8 Blatchf. 170.) The certificate of incorporation of the Thames and Mersey Insurance Company was improperly admitted in evidence. (*People v. D'Agencour*, 95 N. Y. 624; *People v. McCarney*, 83 id. 408, 412; *Williams v. Bk. of Mich.*, 7 Wend. 539; *People v. Peabody*, 25 id. 472, 474; *People v. Davis*, 21 id. 309.) Circumstances create presumptive knowledge in criminal as well as civil cases. (*Yates v. People*, 32 N. Y. 509.) When it is in the power of the person to explain, his failure to do so is strong presumptive evidence against him. (*Gordon v. People*, 33 N. Y. 501.) The People were only entitled to read such portion of the complaint as qualified or explained the part the defendant called attention to. (*Rouse v. Whitehead*, 25 N. Y. 173; *Gary v. Nicholson*, 24 Wend. 353; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; *People v. Gibbs*, 93 id. 470; *Coleman v. People*, 58 id. 555; *Hutchins v. Hutchins*, 98 id. 56, 65.) The exclusion of the offer to show the amount of insurance the Continental was carrying on the twenty-fourth of October was erroneous. (*People v. Noelke*, 29 Hun, 461.) This indictment being found in the

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Superior Court of Buffalo, and charging the defendant with obtaining money within that city by means of false representations, the defendant could not be convicted on proof that he obtained the money in the city of New York. (*People v. Bork*, 91 N. Y. 5, 13; *People v. Sully*, 1 Sheld. 17; *People v. Galloway*, 17 Wend. 540; *People v. Herrick*, 13 id. 87; *People v. Genung*, 11 id. 18; *Comm. v. Wilgas*, 4 Pick. 177; *Chemung Canal Bk. v. Judson*, 8 N. Y. 254; *Dobson v. Pierce*, 12 id. 156.) There is no law forbidding the making of a policy upon a subject already lost. If it contains the phrase "lost or not lost," it is good although not executed till after a loss has happened and both parties know it. (*Mead v. Davison*, 3 Adol. & El. 303; 30 Eng. Com. L. Rep. 95; *Pitney v. Glens Falls Ins Co.*, 65 N. Y. 21; *Van Schoick v. Niag. F. Ins. Co.*, 68 id. 434; 41 Hun, 632.) If a principal accepts the benefits of an act he adopts the whole act, so that if it was unauthorized at the time it was done, it becomes authorized by his accepting the benefit of it. (*Meehan v. Forrester*, 52 N. Y. 277; *Ahern v. Goodspeed*, 72 id. 108.) The court erred in refusing to charge as requested; that although the jury should find that the representations charged in the indictment were made by the defendant, that they were false and that he knew them to be false, the law does not from this infer a fraudulent intent. (*People v. Baker*, 96 N. Y. 340, 350; 2 Bish. Crim. Pro. 183, 184; *Comm. v. Stone*, 1 Metc. 43.) The court erred in declining to require the district attorney to elect which count he would ask for a conviction on. (*People v. Wood*, 59 N. Y. 117; *Phelps v. People*, 72 id. 373; Penal Code, §§ 528, 529.) The motion to direct a verdict at the close of the defendant's case was improperly refused. (*People v. Baker*, 96 N. Y. 340; *Thomas v. People*, 34 id. 354.)

EARL, J. The Thames and Mersey Insurance Company (Limited), of Liverpool, London and Manchester, was a foreign corporation authorized to transact business within this State, and it had a general agency for this country in the city of New York, which was in charge of Angus J. McDonald its

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general agent. The Union Insurance Company of Philadelphia and the Insurance Company of the State of Pennsylvania were Pennsylvania corporations authorized to do business in this State, and the Continental Insurance Company was a domestic corporation. During the year 1883, Thomas G. Crosby and the defendant Lorenzo Dimick were insurance agents at Buffalo doing business under the firm name of Crosby & Dimick, and as such they had the agency of all these companies although in fact the agency of the Continental Insurance Company was in the individual name of Dimick. They were the general agents of all these companies for their inland marine insurance and as such had very general and extensive powers. They had sub-agents at various ports upon the lakes who took risks upon vessels and cargoes and reported them to Crosby & Dimick at Buffalo, who were authorized to reinsure such risks or a portion of them in their discretion. The particular facts constituting this crime, as the evidence tends to show, are as follows: In the latter part of October, 1883, an insurance was effected in the Union Insurance Company by the sub-agent at Detroit upon a cargo of wheat in the schooner James Wade for the voyage from Detroit to Buffalo for \$10,500, and Crosby & Dimick were at once notified of such insurance. By the direction of the defendant \$7,000 of that risk was at once reinsured in the Continental Insurance Company and proper entries to that effect were made on the papers and books of the firm, and the reinsurance became effectual. The schooner never reached her destination, and after the defendant had heard of her loss, about the middle of November, he gave directions to some of the clerks in his office to cancel the reinsurance in the Continental and place \$5,000 of reinsurance in the Thames and Mersey. By erasures on the books and papers and new entries this was in form done, the purpose being to shield the Continental from loss and to impose it to the extent of \$5,000, wrongfully and fraudulently, upon the Thames and Mersey. Subsequently the defendant represented to Macdonald that the Thames and Mersey had the insurance of \$5,000 upon the cargo of the Wade, made to him

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proofs of loss and drew upon him a draft for the amount less a small percentage to wit., the sum of \$4,975, which he as agent of the Thames and Mersey paid, and thus the alleged crime was consummated.

The General Term, in its order of reversal, certified that it found no reason for granting a new trial in the exercise of its discretion or upon the facts after a full consideration of the same and that it reversed the judgment and granted the new trial for errors of law exclusively. We are, therefore, confined in our examination of this case exclusively to the consideration of questions of law raised in the record.

As appears by the opinion pronounced at the General Term, the reversal was there based upon two errors of law which we will first consider.

Upon the trial McDonald was called and examined as a witness for the people, and then he was cross-examined on behalf of the defendant. During his cross-examination he was questioned as to a certain civil action commenced by the Thames and Mersey Insurance Company against the defendant in which he had verified the complaint. Without showing or permitting him to read the complaint, defendant's counsel asked him what he swore to as to a particular matter, and he gave answers showing that the complaint contained an allegation somewhat at variance with his evidence upon his direct examination. After his cross-examination was concluded, he was re-examined on behalf of the People, and the district attorney said: "I desire to offer this copy of the complaint in evidence — the whole of it." Counsel for the defendant said: "I object to it," and the court said, "I think it may be put in evidence for the purpose of showing what he testified to; it can't be evidence upon any other point." The record then shows that the objection was overruled, that an exception was taken and that the complaint was received and marked as an exhibit.

The complaint did contain much matter not relevant to the cross-examination of McDonald and not needful or pertinent to explain or qualify such cross-examination. It contained

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thirteen counts, only one of which related to the matter inquired of upon the cross-examination, and, therefore, the whole complaint was, in no sense, competent evidence, and if the court ruled that it was all competent and allowed it to be read to the jury, as now claimed by the defendant, a clear error was committed. The district attorney had the right to read so much of the complaint as related to the cross-examination and as tended to explain or qualify the facts elicited upon such examination as to its contents, and no more. It cannot be presumed that the trial judge committed the obvious error of allowing the whole complaint to be read to the jury as evidence, and it does not appear that he did. The record does not even show that any part of the complaint was read to the jury, much less that the whole of it was. The district attorney could not prove part of the complaint without proving the whole of it, and he could not put part of it in evidence without proving the whole of it. The whole having been proved, the defendant should have objected to the reading of more than was pertinent and material. Instead of doing that he objected to the whole of it as evidence, and in no way called the attention of the court to the point that only a portion of it was competent. The whole complaint was necessarily received in evidence and marked as an exhibit. But it is a fair construction of what was said by the trial judge in overruling the defendant's objection that he received the complaint only for the purpose of showing what McDonald had sworn to as to the matter inquired of upon his cross-examination, and that he ruled that it was not evidence as to any other matter. With these limitations the complaint was properly received in evidence and the general objection, therefore, was not well taken.

The trial judge charged the jury "to the effect that whether the insurance was legal or illegal the reinsurance by the Thames and Mersey is of no consequence," and to this portion of the charge the counsel for defendant excepted, and it was supposed at the General Term that the exception pointed out substantial error.

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If the effect of the judge's charge was to give the jury to understand that it made no difference in the case whether the reinsurance in the Thames and Mersey was legal or illegal, then the portion of the charge excepted to was erroneous. If the insurance was legal, then there was no false pretense, and no crime was committed within section 528 of the Penal Code, and the gist of the charge made against the defendant in the indictment was unproved. Even if a single phrase, isolated from the rest of the charge, should be found to be erroneous the judgment should not on that account be reversed if the whole charge properly instructed the jury, and it can be seen with reasonable certainty that the erroneous portion did not mislead the jury or influence their verdict.

Reading the whole charge there can be no mistake as to its meaning. It clearly instructed the jury that before they could convict the defendant they must find that the insurance in the Thames and Mersey was illegal and invalid, and that the defendant obtained the money of McDonald by falsely pretending that the insurance was valid and that the company was liable to pay.

The whole course of the trial showed clearly that it was the purpose of the people to show that the insurance in the Thames and Mersey was effected by the defendant after the cargo of the Wade was known by him to be lost, when he could not effect a legal or valid insurance thereon, and that it was the purpose of the defendant to show and claim that the insurance was made before the loss was known to the defendant; and, long before the charge was given, the jury must have fully comprehended that the defendant could not be convicted unless they found that the insurance was effected by him, after knowledge by him of the loss, as claimed by the People. The whole sentence, of which the phrase excepted to is a portion, is as follows: "The court charges the jury to the effect that whether the insurance was legal or illegal the reinsurance by the Thames and Mersey is of no consequence, assuming that the general agent of the Thames and Mersey had it represented to them that there was a reinsurance or insurance in

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their company which was entered in the books, and that relying upon it, their agents so representing, they paid the money on the strength of the representation, though that was false; that they would be guilty of the offense alleged in the indictment if they by reason of the fact that the time had gone by when they could make a legal insurance the insurance itself was illegal." Here is undoubtedly some confusion of ideas and an unfortunate and infelicitous use of language, and the entire meaning of the learned judge is certainly not clear. But, in view of the course of the trial above alluded to, there can be no reasonable doubt that the jury understood that they could not find the defendant guilty of the offense charged, unless they found that the insurance was illegal because effected by the defendant after he had knowledge of the loss. This is made still more clear by a reference to other portions of the charge. Immediately following the portion of the charge above quoted the judge charged the jury that the agents could effect reinsurance upon vessels lost provided that they did not know of the loss, and that such insurance would be legal; "that the meaning of the contract (between the company and the agents) is that when a boat starts out with insurance upon it, the agents had full power and right to reinsure though not knowing or having notice or suspicion that a loss had occurred. Though it turns out that the insurance was effected when the schooner was lying at the bottom of the sea, it would be a valid insurance under these contracts. On the other hand, an insurance is taken out and no reinsurance is effected until the vessel is actually lost and until notice is given to the agent of the loss and thus a reinsurance is effected with the intent and for the purpose of defrauding either the agent or one company in preference to another and with intent to defraud the company with whom the reinsurance is put, and it is done with the knowledge or suspicion for that purpose and intent that the vessel is at the bottom of the sea, then the crime is committed because it is not the intent of the contract that a reinsurance could be effected upon a loss which was decided at the time it was effected, assuming such a loss got

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to the knowledge of the person effecting the insurance or reinsurance. So the jury will see that the question of fact for them to decide is, as to whether in the case before us that the 'James Wade' insurance was effected in the Thames and Mersey after notice came to the defendant of the loss of the vessel. If the jury should find that the reinsurance alleged and charged in the indictment was effected after such loss, and that the defendant knew it and that it was effected with intent and for the purpose of defrauding this company in which the insurance was made for the benefit of one company in preference to another, or for the agent's own benefit or both with that intent or felonious intent, then the offense charged in the indictment would be made out, otherwise not." Then after calling attention to the evidence on both sides as to the times when the reinsurance was effected in the Continental and in the Thames and Mersey, and the time when the defendant had notice of the loss of the Wade, he further charged: "You have the evidence introduced on the part of the people and the evidence introduced on the part of the defense upon that proposition, upon that branch of the case, and one question of fact and a very important question of fact for the jury to determine is, as to whether this reinsurance from the Continental, thus reinsuring the Continental from a portion of her burden was effected after notice of the loss got to the defendant, whether he caused such reinsurance to be made for the purpose and with the intent of charging some other company with the payment of the loss instead of the company in which the reinsurance had been regularly effected." There is more in the charge to the same effect. It was impossible for the jury, from the course of the trial and the whole charge, to misapprehend the law. They were plainly instructed that if the reinsurance in the Thames and Mersey was effected by the defendant before he had notice of the loss it was a lawful insurance and the defendant could not be convicted, and that if such reinsurance was effected after the defendant had knowledge of the loss, it was unlawful and invalid, and, the evil and fraudulent intent being found, the defendant could

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be convicted. And this instruction was right. Marine insurance can lawfully be effected upon property "lost or not lost," and Crosby & Dimick had authority to make such insurance. But the phrase "lost or not lost" in marine insurance always has reference to cases where property has started upon its voyage and the parties to the insurance have no knowledge whether it has been lost or not. In such cases the insurance is against an unknown event and the underwriter takes the risk of the arrival of the property at its destination, and thus there is something to insure. But in case the property has been totally lost and the parties to the insurance know that, there is nothing to insure, there is no longer any risk, no unknown event upon which to base a contract of insurance, and no future event to be indemnified against, and hence there can be no valid or lawful insurance.

We are, therefore, of opinion that the judgment ought not to have been reversed for any of the reasons stated in the opinion of the learned General Term.

But the defendant has the right now to rely, for the purpose of sustaining the reversal, upon any error to be found in the record. His counsel has, therefore, called our attention to many exceptions taken at the trial, to the most important of which we will now give some consideration.

It is contended that the indictment does not sufficiently charge the offense because it does not allege what the perils and risks were against which the defendant represented the Thames and Mersey had insured the cargo of the *Wade*, or that the defendant represented that a loss had occurred from a peril against which the company had insured, or that the defendant represented that any person was insured, or that the defendant knew of the falsity of the representations. The Code of Criminal Procedure in sections 275, 276, 284 and 285, provides rules by which the sufficiency of an indictment may be tested. It must contain a plain and concise statement of the act constituting the crime without unnecessary repetition, and it is sufficient if the act charged as the crime is plainly and concisely set forth with such a degree of certainty as

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to enable the court to pronounce judgment upon a conviction according to the right of the case, and no indictment is insufficient by reason of any imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits. This indictment will stand the statutory tests.

The first count is clearly good, and it is well settled that if one of several counts in an indictment is good, that is sufficient to sustain a conviction under a general verdict of guilty. (*People v. Davis*, 56 N. Y. 95; *People v. Willett*, 102 id. 251.) It is alleged in that count that the defendant represented that the Thames and Mersey had a valid insurance upon the cargo of the *Wade*, that a loss had occurred in consequence of which the liability of the company had become fixed, and that it had thus become legally liable to pay the amount insured. It was wholly unimportant to specify the precise peril against which the defendant represented the company had insured, and it was sufficient to charge simply that the representation was of valid insurance upon the cargo described, and that a loss had occurred which imposed liability upon the company. The indictment does allege that the defendant represented that the insurance was for the benefit of some person, but that the person was to the grand jury unknown. It is sufficiently alleged that the defendant knew the representations to be false. It is charged that "in truth and in fact each and every of the pretences and representations so made by the said Lorenzo Dimick as aforesaid was and were wholly false and fraudulent and untrue, and the said Lorenzo Dimick then and there well knew such was the case," that is, very plainly, that the defendant knew that the pretences and representations were wholly false, fraudulent and untrue; and no person could attach any other meaning to the words "knew such was the case."

Whether the representations alleged in the indictment were such as were calculated or capable to deceive was a question of fact for the jury. It could not be ruled as matter of law upon the face of the indictment that the representations could not and ought not to have deceived any one.

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The property alleged to have been obtained from the Thames and Mersey is sufficiently described in the indictment in the words "the sum of four thousand nine hundred and seventy-five dollars in money of a kind and description to the grand jury unknown and a more particular description of which cannot now be given of the value of four thousand nine hundred and seventy-five dollars." There never was a time in the history of the law when this description of the property obtained would not have been held sufficient. There was the best description which could then be given. The kind of money was unknown. But it was money, currency, a circulating medium of some kind, and what is more important, it was of the value named. These allegations were sufficient to answer all the tests of the Code, to protect all the rights of the defendant and to enable the court to pronounce judgment "according to the right of the case."

It is further contended that the indictment is defective in charging more than one crime contrary to sections 278 and 279 of the Code. These sections provide that the indictment must charge but one crime and in one form except that the crime may be charged in separate counts to have been committed by different means; and when the acts complained of may constitute different crimes, such crimes may be charged in separate counts. Here the crime charged was stealing the property of the Thames and Mersey. In the first count the crime is charged under section 528 of the Penal Code to have been committed by means of the false pretenses and representations alleged; and in the second count the same crime is charged under section 529 to have been committed by drawing the money from the Thames and Mersey by means of a draft which the defendant knew he was not entitled to draw. This then is a case where the indictment charges in separate counts the same crime to have been committed by different means, and the practice is expressly authorized by the Code.

The People were allowed to give evidence upon the trial tending to show that in other cases during the season of 1883, after knowledge of the loss, the defendant changed insurance

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from the Continental to the Thames and Mersey and other companies for the purpose of shielding the Continental from loss and imposing it upon the other companies. This evidence was objected to on behalf of the defendant and its reception is now complained of as error. Such evidence has always been held competent in this class of cases. Here it was necessary for the People to show the evil motive and fraudulent intent of the defendant in changing the insurance upon the cargo of the Wade, after knowledge of the loss, from the Continental to the Thames and Mersey; and for the purpose of showing the motive and intent, it was competent for the People to show that the defendant had done other similar acts, although it might thus be shown that he was guilty of other crimes. (*Mayer v. People*, 80 N. Y. 364; *People v. Shulman*, id. 373; *People v. Everhardt*, 104 id. 591.) The proof as to the other crimes may have been inconclusive, but the People had the right to give it and have it submitted to the jury with proper instructions for their consideration.

The indictment charges that by means of the fraud alleged the defendant obtained "money" of the Thames and Mersey, and it is contended by defendant's counsel that the proof showed that instead of money the company parted with a draft for the payment of money, and hence that there was an entire failure to prove the charge contained in the indictment. The facts are that the defendant drew upon McDonald, the general manager in the city of New York of the Thames and Mersey, a draft for \$4,975, at three days sight. This draft was sent to New York to the National Bank of the Republic and by it was presented to McDonald and was by him accepted on the 11th day of December, 1883. On the seventeenth day of December the Thames and Mersey, by McDonald as its agent, gave to the National Bank of the Republic its check upon another bank for the payment of the draft and the draft was thus paid and surrendered, and as the amount of the check was credited on the books of Crosby & Dimick, it is clear that in some form it reached them in Buffalo. The National Bank of the Republic must be deemed to have been the agent

of the defendant to receive the payment of the draft and payment to it must in law be treated as payment to him. And the bank upon which the Thames and Mersey drew its check must be treated as its agent in making the payment. And thus upon the facts in every real sense money was paid to the defendant, and the charge in the indictment was substantially proved.

It is further objected on behalf of the defendant that the proof failed to establish that the crime was committed in Buffalo. It was partly committed there. Some of the false representations were made there, and some of the steps leading up to the consummation of the crime were taken there. The first oral false representation as to this insurance made by the defendant to McDonald was made there, and the draft and all the other papers were drawn there and sent thence to New York, and the fruits of the crime were finally received in Buffalo, and thus it is clear that the crime was partly committed in Buffalo and partly in the city of New York, and that the case comes within section 134 of the Code of Criminal Procedure, which provides that "when a crime is committed partly in one county and partly in another, or the acts or effects thereof constituting or requisite to the commission of the offense occur in two or more counties, the jurisdiction is in either county." This section conferred jurisdiction upon the Oyer and Terminer to try the case. But our attention is called to section 28 of the Code of Criminal Procedure, which defines the criminal jurisdiction of the Buffalo Superior Court, and provides that it may inquire "by a grand jury of all crimes committed in the city of Buffalo," and that it may "try and determine all indictments found therein or sent there by another court for a crime committed in that city." It may be that section 134 does not affect the jurisdiction of the City Court, and that it has jurisdiction only of crimes wholly committed within the city, and that thus its grand jury did not, in fact and law, have jurisdiction to inquire of this crime. But the grand jury did inquire and did determine that the crime was committed in the city of Buffalo, and it found

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the indictment. It was clothed with power to determine both the facts and law, and we know of no way to review its determination unless it be by motion to quash the indictment or to arrest judgment, and no such motion was made. Upon the trial of the indictment in the Oyer and Terminer, under the plea of not guilty, the only question was as to the defendant's guilt and the jurisdiction of the court to try that question. If the court had jurisdiction of the offense and the offender it could try the case and render judgment, and hence the refusal of the following request to charge, which is now complained of, was not erroneous: "That if the jury believe that the money mentioned in the indictment was paid by the Thames and Mersey Insurance Company through McDonald, its agent, by the latter drawing his check in New York city, upon his bank in New York city, to meet the draft drawn upon the Thames and Mersey Insurance Company, payable in the city of New York, then this crime charged in the indictment was not committed in the city of Buffalo or county of Erie, but in the county of New York, and they cannot convict the defendant under either count of the indictment."

There are very many other exceptions to rulings upon questions of evidence and to the charge as made, and to refusals to charge as requested, found in the record and discussed in the elaborate and able brief presented on behalf of the defendant. They are so numerous that it is wholly impracticable to give them particular attention here. We have carefully examined and considered them all and do not believe that any of them point out any error prejudicial to the defendant. He appears to have had a fair trial, and the verdict of the jury seems to be abundantly sustained by the evidence. Section 542 of the Code of Criminal Procedure provides that "after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties;" and section 684 provides that "neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor any error or mistake therein renders it invalid, unless it has

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actually prejudiced the defendant, or tends to his prejudice, in respect to a substantial right." These are mandates of the law making power, and the courts should, with reason and discretion, give them full force and effect. Giving them the observance due in this case, we find no exception in the record showing that the defendant has been prejudiced in respect to any substantial right.

The judgment of the General Term should, therefore, be reversed and that of the Oyer and Terminer affirmed.

All concur.

Judgment reversed.

HELEN A. MOSER, Executrix, etc., Appellant, v. THOMAS B. COCHRANE, Respondent.

This action was brought by a purchaser of real estate to recover back the portion of the purchase-price paid by him on execution of the contract of sale on the ground that defendant inherited the property from C., who died within three years intestate, that the administration of his estate had not been closed and plaintiff would have to take the property, subject to the debts of the intestate, if any there should be after his personal estate was exhausted, also to the possibility of the discovery of a will within four years after the death which would govern the disposition and render a conveyance void. *Held*, that to entitle plaintiff to relief it was necessary for him to show debts, and an insufficient personal estate left by C.

The court excluded evidence on the trial offered by plaintiff that he was unable to procure a loan on the property and that lawyers, familiar with such questions, regarded a title derived from an heir within the periods named in the complaint, not marketable. *Held*, no error; that the question as to the sufficiency of the title was for the court, and the opinion of conveyancers was immaterial.

Defendant's answer admitted the execution of the contract set forth in the complaint, and as a counter-claim averred readiness and tender of a deed and offer to perform on his part, and asked for a specific performance. *Held*, that the case was brought within the provisions of the Code of Civil Procedure (§§ 501, 502) in reference to counter-claims, and upon establishing the facts alleged defendant was entitled to the affirmative relief sought.

107	35
115	598

107	35
115	178

107	85
155	472

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Defendant's evidence showed, and the court found, the regular issuance of letters of administration, compliance with the statute respecting claims against the decedent, and payment of all debts before the time fixed for delivery of the deed, leaving a balance of personal property. At the time of this finding C. had been dead more than three and a half years. *Held*, that defendant was entitled to a specific performance.

A bare possibility that a title may be affected by existing causes, which may subsequently be developed, when the highest evidence of which the nature of the case admits, amounting to a moral certainty, is given that no such cause exists, is not to be regarded as a sufficient ground for declining to compel a purchaser to perform his contract.

The contract called for a frontage of twenty-eight feet two inches "more or less," the deed tendered, twenty-eight feet more or less; the same description of the property was given in both, bounding it on either side by the walls of adjoining tenements. *Held*, that in such a case quantity was not a material part of the description.

(Argued June 29, 1887: decided October 4, 1887.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 17, 1885, which affirmed a judgment in favor of defendant, entered upon the decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Sol Kohn for appellant. Within three years from the granting of letters of administration, purchasers of real property which belonged to the decedent will not be protected if such decedent's debts exceeded his personalty. (Code of Civil Pro. §§ 2749, 2801; *Slocum v. English*, 62 N. Y. 497; *Hyde v. Tanner*, 1 Barb. 80; *Jewett v. Kenholtz*, 16 id. 195; *Watkins v. Holman*, 16 Peters, 63; *Becker v. Koch*, Alb. L. J., April 9, 1887, p. 270; Sugden on Vendors [ed. 1862], 385, § 1.) The burden of proof as to existence of debts, or insufficiency of personalty for their discharge, does not rest upon the purchaser. Testimony upon these points, whether given by vendor or vendee, is not conclusive, and does not bind actually existing creditors. (Bouv. L. Dict., Tit. Maxims, 129-136; *Shriver v. Shriver*, 86 N. Y. 575; *People v. Open*

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Bd. of Stk. Brokers, 92 id. 104; *Robert v. Sadler*, 6 Cent. Rep. 209; 108 Mass. 400; *Hall v. Partridge*, 10 How. 192; *Lowes v. Lush*, 14 Ves. 547, 548; Sugden on Vend., Art. Doubtful Tit. 384; *Fleming v. Burnham*, 100 N. Y. 8, 9.) The plaintiff's testator, as a purchaser of land, had a right to demand a title which would protect him from anxiety, and which would enable him not only to hold his land in peace, but, if he wished to sell it, to be reasonably sure that no fraud or doubt would come up to disturb its market value. (*Jordan v. Poillon*, 77 N. Y. 521; *People v. Open Bd. Brokers*, 92 id. 98; *Fleming v. Burnham*, 100 id. 1; *Pyrke v. Waddingham*, 17 Eng. L. & Eq. 534; Fry on Spec. Perf. [3d ed.] 421, 426, n. 1; Sugden on Vend. [ed. 1862] 365.) The action brought by plaintiff was one at law. (Code, § 501; *Cowing v. Altman*, 79 N. Y. 169; *Denham v. Cudlipp*, 94 id. 134.)

James R. Marvin for respondent. It was necessary for the plaintiff, to entitle him to recover the deposit-money in a suit in disaffirmance of his contract, to allege and prove all the facts upon which he relied to show a defective title in defendant. (*Spring v. Sandford*, 7 Paige, 550; *Schermerhorn v. Niblo*, 2 Bosw. 161; 6 Paige, 407, 413; 2 Kern. 395; Hopk. R. 436; 7 Paige, 550; Waterman on Spec. Perf., § 415; *Hellreigel v. Manning*, 97 N. Y. 56.) The burden of proof was upon the plaintiff to show defendant's title absolutely bad, before he could be entitled to a recovery. (*O'Reilly v. King*, 28 How. 408; *Lyddal v. Weston*, 2 Atk. 20; *Romilly v. James*, 6 Taunt. 263.) The answer constitutes a counter-claim, and, as no reply thereto was served, it stands admitted, and the defendant was entitled to judgment upon the counter-claim as a matter of course. (Code Civ. Pro., §§ 501, 504, 1204; 37 N. Y. 409; 50 id. 17; 52 id. 237; 39 id. 297; 47 id. 426; 88 id. 258; 61 id. 237; 4 Abb. N. S. 266; 19 Abb. 97; 24 How. 329; 10 id. 67; 13 id. 248; 8 id. 122; 6 Bosw. 452; 2 Civ. Pro. R. 204; 16 Hun, 189; 6 Bosw. 453; 51 Barb 195; 15 id. 365; 22 id. 154.) A counter-claim is a kind of equitable defense which is permitted under the Code

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to be set up where it arises out of the contract set up in the complaint. (52 Barb. 136; 2 Duer, 642; 6 Bosw. 458; 13 N. Y. 257; 37 How. 301; 6 Abb. N. S. 319; 5 Lans. 25-34.)

DANFORTH, J. The complaint sets out an agreement in writing by which the plaintiff undertook to buy and the defendant to sell certain premises in the city of New York for the sum of \$20,500, payable \$1,000 down, and the residue in installments at and subsequent to the delivery of the deed, which it was agreed should be made the 10th day of June, 1882. The \$1,000 was paid and in due time the deed tendered, but the plaintiff refused to receive it and commenced this action on the 11th of August, 1882, to recover the money back on the grounds as stated in the complaint:

"*First.* That the property was part of the estate of James Cochrane, who died intestate on or about the 28th day of December, 1880, and that as the administration of the estate has not been closed, and three years had not elapsed since letters of administration were granted, the plaintiff would have to take the property subject to the debts of the intestate, if any there were, after the personal estate was exhausted.

"*Second.* That four years have not elapsed since his death, and if within four years thereafter a last will and testament of his property be found, it would govern the disposition thereof, and the conveyance to plaintiff be void."

The defendant by answer averred many things not now necessary to refer to in denial and avoidance of the plaintiff's claim, but among other things that all the demands owing by the said James Cochrane had in fact been paid by the administrator, and declaring his readiness and ability to carry out the agreement, prayed that the plaintiff be required to specifically perform it on his part. Upon trial before a court and jury the plaintiff's case was dismissed, but the issue upon the answer retained for hearing at Special Term, where the trial judge found all the facts in favor of the defendant "and that at the time fixed by the agreement for the delivery of the deed, all the debts of the deceased had been paid." He ordered judg-

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ment for the defendant according to the prayer of the answer, and this judgment was affirmed by the General Term.

We think the case on both branches was well decided.

Before the real estate of a decedent can be applied to the payment of his debts, it must be made to appear that the personal estate is insufficient for their payment. The complaint sets up the difficulty, which seemed insuperable to the plaintiff, that if he executed the agreement he "would have to take the property subject to the debts of the ancestor, if any there should be after his personal estate was exhausted." To entitle him to relief, therefore, he was required to show that the title of the defendant was not such as he was bound to accept, and to carry out the theory of the complaint two facts must appear: First, debts; second, an insufficient personal estate left by the defendant's ancestor. As to both, being the moving party, suing to recover back money paid — he held the affirmative. He utterly failed to show either. Indeed he offered no evidence having the slightest tendency to establish these circumstances. Nor was there any error in excluding evidence of the plaintiff's inability to procure a loan upon the property, nor that the reasons assigned by the lawyer to whom application was made, were those stated in the complaint as objections to the title. Other evidence offered was to the effect that members of the legal profession familiar with such questions, regarded a title derived from an heir within the periods named in the complaint, non-marketable. If the facts proved justified the inquiry, the question was one for the court to answer. The opinion of conveyancers against it is quite immaterial. (*Sugden on Vendors*, 174.) The learned trial judge, therefore, properly excluded this evidence, and the plaintiff omitting to produce any other, he could only hold that no cause of action had been made out.

On the other hand the answer set up a counter-claim, and the findings of the court upon competent evidence sustained it. The defendant's claim arose out of the contract or transaction set forth in the complaint and without which the plaintiff would have had no standing as a litigant. The case, therefore,

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is within the Code (§§ 501, 502), and no reason is perceived why the defendant, if he established the counter-claim, should not have the affirmative judgment demanded in the answer. (*Howard v. Johnston*, 82 N. Y. 271.) At the close of the evidence on the part of the defendant on this branch of the case, the plaintiff moved for a dismissal on "the grounds, (1.) that no counter-claim is set up in the answer, and (2.) that the case as made out does not entitle the defendant to specific performance, as it appears that the entire purchase-money was to have been paid in cash." Neither of these propositions are now presented by the appellant, nor could they, with any propriety, be insisted upon. The answer admits the contract as set out in the complaint, states every fact entitling the defendant to its performance, and ask for the appropriate relief. The only foundation for the other suggestion is evidence called out by the plaintiff that after the time fixed for the tender of the deed and consummation of the contract, and after the deed had been tendered and refused, he applied to the defendant and "asked him if he would as lief take all in money, and the defendant replied it would make no difference." The defendant then said he would pay the entire amount in money instead of giving a bond and mortgage. But there was no change in the agreement, nor any pretense that the money was in fact paid.

The learned counsel for the appellant on this appeal, formulates and argues the question "whether a purchaser can be compelled to take title to real property within three years from the granting of letters of administration upon the estate of the party from whom the vendor inherited the property." As applied to the appellant's case it offers for consideration a mere abstraction and it is not necessary now to pass upon it. The doubt as to the title, as the case was presented to the trial court, was upon matter of fact.

The appeal is resisted on evidence and findings which allow no reasonable doubt as to the title offered, even if they do not exclude the possibility of injury to the vendee. It was conceded that the deceased died intestate, and in addition to other evidence on the part of the respondent, proof was given of the

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regular issuance of letters of administration and compliance with the statute respecting claims against the deceased, a consummated advertisement for them and the payment of all, leaving a balance of personal estate amounting to about \$10,000, and the court finds not only that the personal estate left by the deceased was large in amount and in excess of all his indebtedness, but also that all his debts were paid before the time fixed for the delivery of the deed. At the time this finding was made the deceased had been dead more than three and a half years; nearly three years had elapsed from the appointment of the administrator. Even then there could at most be said to be merely a bare possibility that the title would be affected by debts thereafter to be discovered, but of whose existence the plaintiff did not express a suspicion, much less a belief.

The question arising on similar facts was presented in *Spring v. Sandford* (7 Paige, 550), where the same propositions were submitted on behalf of a purchaser wishing to be relieved of his bargain, but they were not sustained. *Schermerhorn v. Niblo* (2 Bosw. 161) is to the same effect, the learned judge saying: "As the law does not regard trifles a bare possibility that the title may be affected by the existing causes which may subsequently be developed, when the highest evidence of which the nature of the case admits, amounting to a moral certainty, is given, that no such cause exists, will not be regarded as a sufficient ground for declining to compel a purchaser to perform his contract." As the case stands it must be deemed settled that the defendant's ancestor died intestate, that the debts owing by him were paid by his administrator in due course of administration, and that none remained which could be the means of impairing the title which the deed tendered did in terms convey.

The objection that the deed calls for a frontage of twenty-eight feet, more or less, while the contract calls for a frontage of twenty-eight feet two inches, "more or less," is not tenable. The same description of the property is given in both instruments, bounding it on either side by the walls of adjoining

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tenements and with such particularity that no mistake could arise as to either its location or dimensions. In such a case quantity is not a material part of the description.

We think there is no error in the judgment appealed from, and that it should be affirmed.

All concur.

Judgment affirmed.

In the Matter of the Application of the NEW YORK DISTRICT
RAILWAY COMPANY to Appoint Commissioners, etc.

The act of 1880 (Chap. 582, Laws of 1880), "providing for excavating and tunnelling * * * for transportation purposes within the villages and cities of this State," authorizes and regulates underground street railways. A railroad confined within the limits of a city and proposed to be built exclusively under the surface of the street thereof, is a street railway within the meaning of the provision of the State Constitution (art. 3, § 18), declaring that no law shall authorize the construction of a street railroad except upon the condition of the consent of the owners of one-half in value the property bounded on and the consent also of the local authorities having control of the street, or in lieu of the consent of the property holders, in case it cannot be obtained, the determination of commissioners appointed by the court that the road ought to be constructed.

As applicable to such a road, therefore, the provision of said act declaring that the determination of commissioners, confirmed by the court, "may be taken in lieu of the consent of said authorities" is unconstitutional and invalid.

The general railroad act of 1850 (Chap. 140, Laws of 1850), has no application to street railroads.

Conceding it does so apply, the authority was taken away so far as relates to street railroads in the city of New York by the act of 1860. (Chap. 10, Laws of 1860.)

The general surface act of 1884 (Chap. 252, Laws of 1884), while permitting such an appointment of commissioners, is limited wholly to surface road and so cannot be applied in aid of an underground street railroad.

Where an order was applied for, under said act of 1880, for the appointment of commissioners, to determine whether an underground street railroad in said city ought to be built without the consent of the municipal authorities or the owners, which application was denied. *Held*, that an order could not be granted to stand for the consent of the property owners alone; that the order must have the statute effect or none, and that, so limited, it would not be the order which the statute authorized.

107	49
113	111
107	49
115	435
107	49
125	97

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It seems the said act of 1880 may stand as an authority for the construction of an underground street railroad upon condition of the assent of the city authorities and the owners of half the abutting values, and rejecting all the provisions for the appointment of commissioners whose order shall be a substitute.

(Argued June 29, 1887; decided October 4, 1887.)

APPEAL by the petitioner, the New York District Railway Company, from an order of the General Term of the Supreme Court in the first judicial department, made October 27, 1886, which denied the application of the petitioner for the appointment of three commissioners to determine whether its railroad ought to be built. (Reported below, 42 Hun, 621.)

The application was made under the provisions of section 1, of chapter 582 of the Laws of 1880 (commonly called the Tunnelling Act), which provides that, on the refusal of property owners to consent, commissioners may be appointed, and their determination, confirmed by the court, may be taken in lieu of the consent of the public authorities and property owners.

The petitioner was incorporated under the General Railroad Act (Chap. 140, Laws of 1850), "to construct a railroad in the city of New York, beginning on Broadway, at a point 190 feet southerly from the southerly line of Morris street, in the city and county of New York; thence by the line of Broadway to the southerly line of Twenty-third street; thence by the most direct route to the intersection of the northerly line of Broadway and Twenty-sixth street; and thence by the line of Broadway to the northerly end thereof; with a branch line from the intersection of Broadway and Twenty-third street to the intersection of Madison avenue and Twenty-sixth street; and thence northerly by the line of Madison avenue to Harlem river."

By chapter 582 of the Laws of 1880, it is provided that "whenever, according to the route and plans adopted by any railroad company, organized under the General Railroad Act, for the construction of its road it shall be necessary or proper to build said road or any part thereof under ground, it shall be lawful for said company to enter upon and acquire title to

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and use such lands under water and upland * * * as shall be necessary for the purposes herein mentioned, and they shall have the power to * * * purchase or acquire in the manner now provided by law, such lands or rights or easements in land along their said route, upon, over or beneath the surface thereof as may be necessary for the building of their said road; * * * and provided further that whenever such road or any part of the same is intended to be built within the limits of any city * * * of this State, and to run by means of a tunnel underneath any of the streets, roads or public places thereof, said company, before building the same underneath any of said streets, roads or public places, shall obtain the consent of the owners of one-half in value of the property bounded on the line, and the consent * * * of the proper authorities having control of said streets, roads and public places, or in case such consent of the owners of property bounded on the line cannot be obtained, the General Term of the Supreme Court in the district in which such city * * * is situated, may, upon application, appoint three commissioners who shall determine, after hearing all parties interested, whether such railroad ought to be built underneath such streets, roads or public places, or any of them, and in what manner the same may be so built with the least damage to the surface and to the use of the surface by the public; and the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent of said authorities and property owners."

The petition alleges, among other things, that according to the routes and plans adopted by petitioner for the building of its road, it is necessary to build the same under the streets, roads and public places above mentioned; that petitioner has been unable to obtain the consent required by the act of 1880, "because of the refusal of the owners of more than one-half in value of the property bounded on the main line of your petitioner's said railroad to consent hereto."

The petitioner asks for the appointment of three commissioners to determine whether its railroad ought to be allowed to be built underneath the streets aforesaid, or any of them,

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and in what manner the same may be so built with the least damage to the surface and to the use of the surface by the public, and further, to report their conclusions as to what compensation, if any, should be made to the said city of New York by the petitioner, if allowed to build its road.

The application was opposed by abutting property owners, the Mayor, Aldermen and Commonalty of the city of New York, and certain railroads, claiming prior exclusive privileges in Broadway, who filed answers raising various objections to the appointment of commissioners. The General Term denied the motion on the ground of the unconstitutionality of the act of 1880.

Grosvenor Lowrey and *Ch. Francis Stone* for New York District Railway Company, appellant. The subterranean railroad contemplated by the act of 1880, shown in the plans of the petitioner, is not a "street railroad" within the meaning of article 3, section 18 of the Constitution. (*Story v. N. Y. El. R. R. Co.* 90 N. Y. 161; *Coverdale v. Charlton*, L. R. 4 Q. B. D. 104; *McCarthy v. City of Syracuse*, 46 N. Y. 199; *In re Gilbert E. R. Co.* 70 id. 373; *Goodson v. Richardson*, 9 Ch. L. R. 221, 223; 3 Kent's Comm. 573 [12th ed.] side page 433; *Goodtitle v. Alker*, 1 Burr. 143, 146; *Cattle v. Stockton Water-Works*, L. R., 10 Q. B. 455; *Robert v. Sadler*, 5 N. Y. 594; Co. Litt. 4; *Lahr v. Met. El. Ry. Co.*, Ry. Cor. L. J. 148; Smith's Const. L. 512; 55 N. Y. 375; 13 Phila. R. 130; *Hoyt v. Sixth Ave. R. R. Co.*, 1 Daly 528; Laws 1850, p. 211, § 1; 224, § 28, subd. 5; 225, § 28, subd. 7; Laws 1850, chap. 140, §§ 1, 27, 28, subds. 9, 36, 37; *In re N. Y. Cable Co.*, 4 N. Y. 311; *Ferry Leases & R. R. Grants*, N. Y., 1886, 251, 253, 294, etc.; Laws of 1854, p. 323; Laws of 1860, p. 232; State Engin. Rep., Feb. 20, 1867, Ass. Doc., 1867, No. 114, p. 3; Laws 1867, chap. 906; State Engin. Rep., 1868, 65, 471, etc.; 1 Laws 1869, chap. 917, §§ 3-7; 1 Laws 1869, chap. 165, p. 303, § 25; 1 Laws 1868, p. 464; 2 Laws of 1872, p. 1798, § 9; *N. Y. City R. T. Ry.* Laws of 1872, p. 1985, § 7; *Brook-*

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lyn St. Tr. Co., 2 Laws of 1871, 2160, 2162, §§ 1, 6; *Wiggins v. E. St. L. R. R.*, 107 Ill. 455.) The construction given to the prohibition of the Constitution by the legislature in the passage of the tunnel act, is itself ground for upholding the constitutionality of its interpretation of the prohibition. (55 N. Y. 54; 50 id. 553; 14 Mass. 340; 17 N. Y. 235; 23 Wend. 166; *In re Gilbert E'l. Ry. Co.*, 70 N. Y. 370, 371; *Sage v. Brooklyn*, 89 id. 200; *Settle v. Van Evera*, 49 id. 285; *People v. Mann*, 97 id. 536; *People v. Carr*, 100 id. 236; *Donahugh's App.*, 86 Penn. 310.) The tunnel act is not void in point of form because the legislature has failed to express in the act the condition imposed by the Constitution. (Const., art. 3, §§ 16, 17, 20; *Clark v. Blackmar*, 47 N. Y. 150.) The act, if void at all, is void only as to the particular part of it which is unconstitutional. (*In re Middletown*, 82 N. Y. 196, 204.) The record contains no legal evidence that any insurmountable obstacle to the appointment of commissioners exists. (*In re Thirty-fourth St. R. R. Co.*, 102 N. Y. 354.)

Esek Cowen for appellant. Chapter 582 of the Laws of 1880 does not authorize the construction or operation of a street railroad. (*McCarthy v. Syracuse*, 46 N. Y. 199; *Heath v. Des Moines & St. L. Ry. Co.*, 61 Ia. 11.) The road proposed to be built by the petitioner, by virtue of its organization under the general railroad act, is not a "street" railroad within the meaning of the Constitution. (*G. R. & Ind. R. R. Co. v. Heisel*, 38 Mich. 62; *Wiggins F. Co. v. E. St. L. U. R. R. Co.*, 107 Ill. 450; *In re Kings Co. El. Ry. Co.*, 82 N. Y. 99.) The provision of said act that the decision of the Supreme Court commissioners may be taken, in lieu of the consent of the local authorities, may be void. That does not avoid the entire act. (*People ex rel. v. Kenney*, 96 N. Y. 294; *People ex rel. v. Briggs*, 50 id. 553; *In re Broadway S. R. R. Co.*, 34 Hun, 414; *In re Thirty-fourth Street R. R. Co.*, 102 N. Y. 354.) The statute does not provide for or contemplate any hearing of opposing parties upon the application to appoint commissioners. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 327, 356; *In re Thirty-fourth Street R. R. Co.*, 102 id. 354.)

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Edward W. Paige for the Broadway Underground Connecting Railroad Company, respondent. The words "street railroads," as used in article 3, section 18 of the Constitution, are not applicable alone to surface railroads. (*In re N. Y. El. R. R. Co.*, 70 N. Y. 354; *In re Gilbert El. R. R. Co.*, id. 361, 372; *In re Kings Co. El. R. R. Co.*, 82 id. 95, 98; 41 Hun, 425; 7 Cent. Rep. 232.) So much of chapter 582 of the Laws of 1880 as authorizes the construction of street railroads is unconstitutional and void. (*Stuart v. Palmer*, 74 N. Y. 183, 188.) The act under which the application for the appointment of commissioners was made in the court below was unconstitutional, in that it attempted to substitute the report of commissioners, when confirmed by the court, for the consent of the local authorities and of the property owners. (Const. art. 3, § 18, last subd.; *In re Thirty-fourth Street R. R. Co.*, 102 N. Y. 343.)

Edward B. Thomas for New York Arcade Railroad Company, respondent. When a railway company is, by special act, authorized to construct its road in certain streets, it is to be deemed a practical location by the legislature. (*In re Coney I. R'y Co.*, 12 Hun, 451; 2 Wood's R'y Law, 748.) When a line has been duly located another company may not, in any manner, interfere with it. (*T., etc., R. R. Co. v. W., etc., R. Co.*, 12 Phil. 642; *H. R. R. Co. v. L. & H. R. R. Co.*, 118 Mass. 391; *W. & N. R. R. Co. v. R. R. Com'rs*, id. 567; *B. & M. R. R. Co. v. L., etc., R'y Co.*, 124 id. 368; *M., etc., R. R. Co. v. Blair*, 1 Stockt. [N. J.] 635; *C. C. R. R. Co. v. Moss*, 23 Cal. 323; *Packer v. S. & E. R. R. Co.*, 19 Penn. 211-220; *Coe v. N. J. M. R'y Co.*, 4 Stewart N. J. Eq. 146; 2 Wood's R'y Law, 750; *In re R. R. Com'rs*, 66 N. Y. 418; *N. J. S. R. R. Co. v. L. B. Com'rs*, 10 Vroom. 28; *M. & E. R. R. Co. v. Cent. R. R. Co.*, 2 id. 214; *R'y Co. v. Alling*, 99 U. S. 463; *Boston W. T. Co. v. B. & W. R. R. Co.*, 23 Pick. 366; *In re B. & A. R. R. Co.*, 53 N. Y. 573; *In re N. Y. C. & H. R. R. R. Co.*, 77 id. 256.) The legislature has expressly reserved the rights of the Arcade Company. (Laws

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of 1886, chap. 312, § 14.) Chapter 582, of the Laws of 1880, called the "Tunnel Act" is unconstitutional. (*State v. Davenport, etc., R'y Co.*, 47 Ia. 507; *In re Thirty-fourth Street R'y Co.*, 102 N. Y. 350.)

D. J. Dean for the City of New York, respondent. The act, chapter 582 of the Laws of 1880, violates section 18 of article 3 of the Constitution. (*Davis v. Mayor, etc.*, 14 N. Y. 506; *People v. Kerr*, 27 id. 194; *In re Kings Co. El. R. R. Co.*, 82 id. 95; *In re N. Y. El. R. R. Co.*, 70 id. 354; *In re Gilbert El. R. R. Co.*, id. 361, 372; *People ex rel. Wood v. Lacombe*, 99 id. 49; *People ex rel. Twenty-third Street R. R. Co. v. Com'rs Taxes*, 95 id. 558; *Birck v. Newbury*, 10 id. 389; *O. S. Co. v. Dolloway*, 21 id. 461; *People v. Potter*, 47 id. 375; *People v. Green*, 2 Wend. 274; *People v. Brundage*, 78 N. Y. 406.)

Henry D. Sedgwick for the New York Underground Railway Company, respondent. The provisions in the General Railway Law in regard to the time of commencing and completing railroads organized under it do not affect the New York Underground Railway Company, because its charter contains all the provisions by which such commencement and completion are authorized and controlled, and the corresponding provisions of the General Railway Act, being inconsistent therewith, have no application. (Charter, chap. 230, Laws of 1868, § 3, as amended by chap. 824, Laws of 1869, §§ 7, 11; *Vesscher v. H. R. R. Co.*, 15 Barb. 37; *Mosier v. Hilton*, 15 id. 657; *H. R. R. Co. v. Outwater*, 3 Sandf. 689; *Clarkson v. H. R. R. Co.*, 12 N. Y. 304.) The New York Underground Company has "acquired and is vested with an exclusive right or franchise, to construct, maintain or operate a railroad under any portion of Broadway." (*Lahr v. Met. El. R. Co.*, 104 N. Y. 268, 290; *Brookly St. Tr. Co. v. City of Brooklyn*, 78 id. 524, 533.) The railroad proposed by the petitioner is a street railroad in the sense of the act. (*In re El. R. Co.*, 70 N. Y. 327, 354, 372; *Kings Co. v. El. R. Co.*, 82 id. 95, 98, 99.)

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Horne Russell for Hilton and others, abutting owners, respondents. The unconstitutional part cannot be severed from the constitutional portions of the act of 1880. (Cooley on Const. Lim., 178; *In re Middletown*, 82 N. Y. 203; *People v. Porter*, 90 id. 68; *Comm. v. Potts*, 79 Penn. St. 164, 168; *Wynehamer v. People*, 13 N. Y. 378.) The constitutional validity of a law is to be tested, not by what has been done under it, but what may, under its authority, be done. (*Stewart v. Palmer*, 74 N. Y. 183, 188.) Article 3, section 18, of the Constitution applies to an underground railroad built in the streets of a city. (*People v. Potter*, 47 N. Y. 375; *People v. Fancher*, 50 id. 288; *In re Kings Co. El. R. R. Co.*, 82 id. 95; *In re El. R. R. Co.*, 70 id. 354, 361; Rapid Tr. Act Laws of 1875, chap. 606, § 4; *In re Gilbert El. R. R. Co.*, 70 N. Y. 372; *People v. Green*, 2 Wend. 274; *People v. Carr*, 100 N. Y. 243; *People v. Brundage*, 78 id. 406; *Cohens v. Virginia*, 6 Wheat. 420.) The company has under its charter no right to build and operate only a portion of the line by law. A company can be compelled by *mandamus* to operate its whole line, and has no right to abandon any part of it. (*People v. A. & V. R. R. Co.*, 24 N. Y. 261; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 343; *State v. H. & N. H. R. Co.*, 29 Conn. 538; *In re Thirty-fourth Street R. R. Co.*, 102 N. Y. 343, 354.) The petition is defective in failing to show that the route has been properly adopted. (Laws of 1880, chap. 582, § 1; Laws of 1850, chap. 140, § 22; Laws of 1872, chap. 560 § 1.)

FINCH, J. No act of the legislature warrants this application except that of 1880 (Chap. 582) under which alone it was made, and which furnished the sole authority for the appointment sought. The general act of 1850 (Chap. 140) provides only for commissioners of appraisal, and not at all for officers who are to determine the necessity of the road, and whose order is to take the place of requisite consents. The Rapid Transit Act of 1875 (Chap. 606) does provide for similar commissioners, but vests their appointment in the Mayor and not in the Supreme Court. The General Surface Act of 1884

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(Chap. 252) permits such an appointment but is limited wholly to surface roads and cannot aid the petitioner. Its application must stand or fall upon the authority which it has invoked, and if for any reason that is insufficient, the denial of the application must be affirmed.

The petition proceeds upon the assumption that both the consent of one-half of the abutting values and that of the city authorities are essential to its rights of construction and operation; that one, at least, it has been unable to obtain; and that as a substitute for both it seeks the appointment of commissioners whose order may supply the existing defects. If for any reason the company has rights which are independent of such an order, or can obtain the needed consents, the application was superfluous and no injury has followed its denial. It appears to be conceded that, if the act of 1886 be deemed to authorize the construction and operation of a street railway, it is unconstitutional so far at least as it authorizes the appointment of commissioners, whose order shall be a substitute for the consent of the city authorities. The constitutional amendment of 1874 (Art. 3, § 18) provides that "no law shall authorize the construction or operation of a street railroad" except upon the condition of the two consents referred to, and permits the order of the court confirming that of the commissioners to stand in the place of the landowners' consents only. The act of 1880 makes such order a substitute also for the consent of the authorities. But it is contended, first, that the act of 1880 does not authorize any railway at all, and operates only to amend and restrict authorities already conferred; and, second, that if it does authorize the construction and operation of a railway, it is one which is not a street railway, but of a different character to which the constitutional provision does not apply.

We have reached the conclusion that the act authorizes and regulates underground street railways in a city or village, and that the appellant's road is such a railway. Its line lies wholly in the city of New York, and its very description in the articles of association and in the petition strongly suggests

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its character. It begins "*on* Broadway, at a point one hundred and ninety feet southerly from the southerly line of Morris street;" "thence *by the line* of Broadway to the southerly line of Twenty-third street; thence by the most direct route to the *intersection* of the northerly line of Broadway and Twenty-sixth street; thence by the line of Broadway to the northerly end thereof." The branch line has a similar description, and both are so identified with the streets as to have no description separate from them. The route of the road is thus *on* these streets, although beneath their surface, and it is intended to subserve many of the principal purposes to which they are devoted, and to share with them in their utilities and burdens. The transfer of passengers and freight from one part of the city to another, giving freedom of access to all localities and enabling transit by horse power, is one of the main uses of a city street. The underground road renders it possible to manage this movement without change of line or locality by the use of steam, and when in full operation will subserve to a great degree the ordinary street uses and purposes. This fact the law of 1880 recognizes, and identifies the railway with the street by its third section. That explicitly declares that "the use of the streets and docks and lands, beneath which said railroad is constructed, and the right of way beneath the same for the purpose of said railroad, shall be considered, and hereby is declared, a public use consistent with, and one of the uses for which, its streets, avenues and docks are publicly held." The legislature seems to have deemed it wise to make the underground road a part of the streets, and its operation a street use, by direct enactment. The railway in return reaps its own benefit from this connection with the streets. It follows them because, the assent of the authorities once gained, it is obliged to buy or condemn no land for its line, since usually the city owns the fee, and it more readily finds its passengers and patronage from its location on the streets. If now we turn to its manner of construction we observe that it proposes to remove the present surface of the street, and make its own roof that surface in

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the future. Not merely is the easement of the public affected temporarily by the process of construction, but permanently by changing wholly the support of that surface. We have often held that the right of the public in the streets of a city extends to and embraces, besides the support of the surface, the necessary sewerage and room for water and gas pipes and the like; and the right to lay and maintain these is an important part of the public easement. All of these the petitioner proposes to remove, and place them in a new position more convenient for its purpose. It is estimated that this one interference with the street will cost the company \$750,000 a mile. Not only that, but openings are to be made in the street for purposes of ventilation, which must permanently remain, and other openings for access must be constructed and continue to exist. When the work is all done the street will consist of two stories or surfaces, one carrying the ordinary traffic and movement, lessened by so much as is diverted to the swifter transit of the other, and both together will do what one alone did to the extent of its capacity.

Such a road is to be deemed a street railway, not only because it subserves street purposes and reaps the benefit of street easements, and occupies and modifies the street surface, but also because it is fully within the mischiefs which the constitutional provision was designed to redress and prevent. That evil was indicated by the character of the remedy applied, which was to forbid all such constructions, except with the consent of the authorities, and also of the adjoining owners to the extent of one-half of the abutting values, or an order of the court as a substitute for such last consent. An ordinary railway terminating in or passing through the streets of a city or village, would occupy them but slightly and be concentrated in a single limited locality. And yet, since even such partial occupation might work injury to the public right, the consent of the city authorities is made requisite as a guard and protection. But street railways may occupy every street in a city and iron the whole surface, or spin their webs in the air over every avenue, or undermine the entire system of city

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streets. To authorize such is to inflict injury upon adjoining lot owners, in greater or less degree, and hence the consent of a due proportion of these was required by the Constitution, or, instead, the order of selected commissioners confirmed by the court. Where the railway runs under the streets, the adjoining owners are as much and as dangerously affected as where it runs on their surface or above them. Whether the new surface is safe and sufficient, or weak and perilous, and invites or frightens away passage; whether the openings obstruct or hinder access to the abutter, or pour out through the ventilators smoke and steam upon his premises; whether his vaults and foundations will remain safe and secure, or be undermined, or weakened by vibration; whether his gas and water supply will continue ample and convenient, and the new sewerage work him no injury; all these are to him questions of vital importance, affecting his comfort and convenience, the success of his business and the value of his property. The same reasons which dictated a constitutional protection against roads on or above the surface of the streets, apply to those which are built beneath in the manner here contemplated, and these should justly be deemed street railroads within the meaning of that phrase as used in the Constitution. The rapid transit act, passed very soon after the constitutional amendment, applies its provisions to roads under as well as on or above the surface, and so tends to support our conclusion.

The act of 1880 contemplates and regulates just such an underground railway as is now sought to be constructed. It in terms relates to one lying wholly within city limits, running beneath its streets, cutting out and replacing their surface and leaving in them openings for access and ventilation. If the act authorizes any railway at all, it authorizes a street railway within the terms of the constitutional prohibition. But it is claimed that it authorizes no railway whatever, and for that reason escapes the control of the fundamental law. The company's counsel argue that it gets its authority for the construction and operation of its underground road, not from the act of 1880, but from the general act of 1850, under which it

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was organized. But that act, as we have held, has no application to street railroads (*N. Y. Cable Co. v. Mayor, etc.*, 104 N. Y. 1), and, if it had, the act of 1860 (Chap. 10) takes away the authority so conferred, for it provides that "it shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any or either of the streets or avenues of the city of New York, wherever such railroad shall commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide." Having held that appellant's road is a street railway, and shown that it is planned to be built in and along the city streets, it follows that it has and can have no authority to construct its proposed road under the act of 1850; and if it does not get it under the act of 1880, it has no authority at all and no standing before the court. I think that the truth may be that the appellant derived its corporate existence from the act of 1850, but certainly not its right to construct its contemplated road; that such right could only come from the rapid transit act or the act of 1880, and that the latter is an act which authorizes the construction and operation of a street railway, and so is within the constitutional provision.

It is further said, however, that only so much of the act of 1880 is invalid as makes the order of the court confirming the report of the commissioners stand for the consent of the authorities, and that the order may be granted and stand for the consent of the property owners alone. We cannot see our way to that conclusion. The order, when made, is a single thing, which must have the statute effect or none. We cannot divide or mutilate it without changing its inherent character, purpose and effect. Limited to the consent of the land owners, it would be a good order, but not the order which the statute authorized. The legislature has declared that when made it shall stand for two things. We are asked to say that it shall not, but only for one. If we do that, we invade the domain of the legislature; we change its mandate as to the effect of the order; it ceases to be the order authorized, and becomes another and different one. It is not the case of two

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independent provisions, one of which may be rejected without affecting the remainder of the act, for we cannot lessen the effect of the order without maiming the order itself and its statutory character. Very possibly, the act may stand as an authority for the construction of an underground street railway upon the condition of the assent of the city authorities and the half of abutting values, and rejecting all the provisions for the appointment of commissioners, whose order shall be a substitute. Further than that we do not deem it our duty to go.

The order should be affirmed, with costs.

All concur.

Order affirmed.

JAMES SILVEY, Respondent, v. WILLIAM W. LINDSAY et al,
Appellants.

The Soldiers' Home, incorporated under the act of 1876 (Chap. 270, Laws of 1876), is an "asylum," and its inmates are supported at public expense, within the purview of the provision of the State Constitution (art. 2 § 3), declaring that "for the purpose of voting no person shall be deemed to have gained or lost a residence * * * while kept at any alms-house or other asylum at public expense."

The fact of the presence in that institution of an inmate, therefore, does not constitute a test of his right to vote, and is not to be considered in determining that question; he must find the requisite qualifications elsewhere.

Plaintiff offered to vote at the annual town meeting for the year 1886 in the town of B., wherein said institution is located. On being challenged, plaintiff stated in substance, that he resided in the town of B., for the reason that he was admitted an inmate of said Home in 1880 and had remained an inmate since that time, with the intention at all times of making his residence in said institution so long as he should be permitted to remain; that at the time of such admission he was an honorably discharged soldier and a resident and voter in the city of New York; that, therefore, he was a resident of the town, and that in becoming an inmate he intended to change his residence from said city to said town. *Held*, that plaintiff was not entitled to vote; that his narration of an intention to change his residence and his assertion that he was a resident of the town could be accepted only as his conclusions from the circumstances

107	55
143	106

107	55
146	237

107	55
164	21

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detailed; that the town officers presiding at such election were not bound by them, but by the facts, and so were justified in rejecting the vote.

It seems that one duly qualified to vote, as provided by the Constitution (art. 2 § 1), cannot be deprived of that right by any inferior tribunal; the officers presiding at an election determine the question at their peril, and are liable to him in damages, in case of an erroneous determination that he is disqualified, and a rejection of his vote.

Silvey v. Lindsay (42 Hun, 116) reversed.

(Argued June 29, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which directed judgment in favor of plaintiff upon a case submitted under the Code of Civil Procedure (§ 1279, *et seq.*) (Reported below, 42 Hun, 116.)

From the agreed case it appeared that on the 9th day of February, 1886, the plaintiff was, and since 1880, had been an inmate of the Soldiers' Home, an institution duly incorporated (Laws of 1876, Chap. 270), and situated in the fifth election district of the town of Bath, Steuben county. The expenses of the institution and the support of its inmates are paid by the State out of annual appropriations made by the legislature.

On the said 9th day of February, 1886, the annual town meeting for the town of Bath was duly held at the court house, in said town, for the election of a supervisor and other town officers. The defendants were the justices of the peace of said town, and as such were present and presided at such town meeting and received the votes of all the persons who voted at said town meeting.

The plaintiff offered to vote and, being challenged, made the statement set forth in the opinion. The statement was true and known to be so by the defendants, but they refused to receive his vote, saying: "We decide that you are not a legal voter here, for the reason that on the facts stated, you are not a resident of the town of Bath."

The question submitted to the court was: "Did James Silvey (the plaintiff), gain a residence in the town of Bath, so as to entitle him to vote at said town meeting by reason of his presence as an inmate of said institution?"

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It was agreed that, in case the question was answered in the affirmative, judgment should be rendered in favor of plaintiff for fifty dollars damages and costs.

Judgment was rendered accordingly.

Further facts appear in the opinion.

J. F. Parkhurst for appellants. The relator did not gain a residence in Bath while an inmate of the New York State Soldiers and Sailors' Home because that institution is an asylum maintained at public expense, and its inmates are within the provisions of section 3 of article 2 of the Constitution. (*Newell v. People*, 7 N. Y. 97, 109; *People v. Potter*, 47 id. 379; Sedg. on Stat. and Const. Law, 242; *People v. Dayton*, 55 N. Y. 375; Smith Com. 512, 634; *Prigg v. Penn.*, 16 Pet. 539; *Holmes v. Carley*, 31 N. Y. 289; *People v. U. Ins. Co.*, 15 Johns. 358; Bac. Abr. Tit. Stat. 1, 5, 10; *Jackson v. Collins*, 3 Cow. 89; *Dresser v. Brooks*, 3 Barb. 429; *Donaldson v. Wood*, 22 Wend. 395; Cool. Const. Lim. 54, 55, 64, 66; *People v. Morrell*, 21 Wend. 584; *McKean v. Devries*, 3 Barb. 196; *People v. Blodgett*, 13 Mich. 138; *In re Fitzgerald*, 2 Caines, 317; *In re Wrigley*, 8 Wend. 41; *Frost v. Brisbin*, 19 id. 11; *Williamson v. Parisien*, 1 Johns. Ch. 392; *Hegeman v. Fox*, 31 Barb. 475; *Du Puy v. Wurtz*, 53 N. Y. 556; Cool. Const. Lim. 598, 599; *People v. Willson*, 62 N. Y. 186; Laws of 1878, chap. 48, § 9; Laws of 1865, chap. 587; R. S. [Bank's 7th ed.] 1222, § 19, etc.; *Sinks v. Reese*, 19 Ohio St. 316; *Renner v. Bennett*, 21 id. 431; *Sturgeon v. Korte*, 34 id. 525; *People v. Holden*, 28 Cal. 123; *People v. Brady*, 40 id. 198; *S. C.*, 6 Am. Rep. 604; *Chaine v. Willson*, 1 Barb. 673; 3 Rawle (Penn.), 312; 4 Black. Com. 225; 2 Russell on Cr. 28; 4 Coke, 440; *De Meli v. De Meli*, 67 How. Pr. 20; *Still v. Woodville*, 38 Miss. 646; Laws of 1878, chap. 48, § 6; *New York v. Furze*, 3 Hill, 612; *Hudson v. New York*, 9 N. Y. 163; *Phelps v. Hawley*, 52 id. 23; *Ryall v. Kennedy*, 67 id. 379; *Sanders v. Getchell*, 76 Mo. 165; Cool. Const. Lim. [2d ed.] 601, note; *People v. Riley*, 15 Cal. 48; R. S. [Bank's 7th ed.] p. 1858, § 28, etc.)

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M. Rumsey Miller for respondent. The respondent was a voter in Bath, unless section 3 of article 2 of the Constitution is prohibitory of the right to vote. (*Roosevelt v. Kellogg*, 20 Johns. 211; *Hegeman v. Fox*, 31 Barb. 475, 476; *De Puy v. Wurtz*, 53 N. Y. 556, 561; *Kennedy v. Ryall*, 67 id. 379, 386; *Heidenbach v. Schland*, 10 How. Pr. 477; *In re Wrigley*, 8 Wend. 134; Const. of N. Y., art. 2, § 1; 1 R. S. Chap. 11, tit. 2, art. 1, § 1.) Section 3 of article 2 of the Constitution is not prohibitory of the respondent's right to vote. (Const. art 1, § 1; *People v. Holden*, 28 Cal. 123; 5 Metc. 587, 588, 589, 590; *Sanders v. Getchell*, 76 Me. 165.) He had abandoned and lost his residence in New York. (*In re Wrigley*, 8 Wend. 134; *Heidenbach v. Schland*, 10 How. Pr. 477.) The defendant was a voter because the "Home" is not an almshouse or asylum within the meaning of section 3, article 2 of the Constitution. (Laws of 1876, chap. 270, §§ 1, 2, 3, 4, 5; Laws of 1878, chap. 48, §§ 1, 3, 4, 6; *Goodale v. Lawrence*, 88 N. Y. 517; 3 R. S. [Bank's ed.] 1899, 1904.)

DANFORTH, J. The plaintiff's vote was rejected upon the sole ground that he was not a resident of Bath. That he was by age, sex and citizenship duly qualified to exercise the franchise was not denied, but the defendants after hearing his oath and his statement under it, decided that he had not been within the meaning of the law for "thirty days next preceding the election, a resident of the district from which the officers were to be chosen for whom he offered to vote." The right claimed by him involved this inquiry (Cons. of N. Y., Art. 2, § 1), and as to it (his vote being challenged), he said as follows: "I answer that I reside in the town of Bath, for the reason that I was admitted an inmate of the New York Soldiers and Sailors' Home in this town, by the authorities thereof in the year 1880, and have remained such inmate from that time to the present, with the intention at all times of making my residence in said institution, so long as I shall be permitted to remain such inmate. At the time of my admission to said institution I was an honorably discharged soldier of the

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United States, and a resident and voter of the city of New York; I, therefore, answer that I am a resident of the town of Bath. In becoming an inmate of said institution, I intended to change my residence from the city of New York to the fifth election district of said town of Bath."

It is obvious that his narration of an intention to change his residence to Bath, and his assertion that he resided in Bath, can be accepted only as conclusions from the circumstances detailed in connection with them. They were his conclusions and defenda^{nt}s, in view of his whole statement, were not bound by them. They were bound by the facts stated and were required to say upon those facts whether the plaintiff was qualified in the necessary particular, and undoubtedly they were to determine the question at their peril. The Constitution in the section referred to (*supra*), specifies the qualifications necessary to the elective franchise, provides who shall have the right to vote, and one duly qualified cannot be deprived of that right by any inferior tribunal. But the Constitution also provides (art 2, § 3): "For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning, nor while kept at any alms-house, or other asylum at public expense; nor while confined in any public prison," and the decision of the inspectors of election was that in their opinion the intending voter was in Bath as a mere inmate of the institution and for a temporary purpose, and not as a resident of the voting district, or with intent to make the town a fixed or permanent place of residence, and so it would seem. His presence there was eleemosynary in its character; he was there as a dependent, because he had no means of support or relatives to maintain him, and liable to be discharged whenever the board of trustees were satisfied that he was of sufficient ability or means to support himself. (Rules and regulations of the Home.) As to the Home, he was a beneficiary, and

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nothing else. As to Bath, his residence was a beneficiary's residence, and no other. His relations were not with the village, but with the institution, which was situated within its borders. His intention to remain was conditioned upon and limited to the duration of the charity which he enjoyed. His intention to remain in Bath depended upon his expectation to remain at the Home. This gave no residence, for he was there only in the character of a beneficiary, for a temporary purpose.

His only intention in going to Bath was to be an inmate of the Home, and it was only as such inmate that his residency was to be continued. He was not there as a citizen changing his residence, but as an object of well bestowed and deserving charity. He was, as is clear upon his statement, present in Bath and at the institution because he was then "kept" (that is, supported) * * * "at public expense." "I reside in Bath," he says, "for the reason that I was admitted to the Home as an inmate." He continues there with the intention of making his residence in the institution, so long, he says, "as I shall be permitted to remain an inmate." These reasons satisfied the conscience of the plaintiff and enabled him to say he was a resident of Bath, but in reality they bring the case within the prohibition of the Constitution. He could not gain a residence by being an inmate, which means nothing more than his presence in the Home; and excluding that there is nothing in the case to show that a residence in Bath had been acquired.

It follows that he has not lost the right to vote in the place of his legal residence — New York, for the provision of the Constitution in question also declares that he shall not lose his residence by reason of such "presence" in the "institution." As to that city he is to be regarded as temporarily absent and his residence as a citizen still therein.

We have no doubt that the institution in question is within the purview of the constitutional provision (art. 2, § 3) above referred to. It is an asylum supported at the public expense, and its members are within the mischief against which that provision is aimed, the participation of an unconcerned body of men in

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the control through the ballot-box of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which by the officers their ballots might elect, they sustain no injury. But the question in each case is still as it was before the adoption of the Constitution, one of domicile or residence, to be decided upon all the circumstances of the case. The provision (art. 2, § 3) disqualifies no one; confers no right upon any one. It simply eliminates from those circumstances the fact of presence in the institution named or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere.

We think, therefore, the question submitted by the parties, viz., "Did James Silvey gain a residence in the town of Bath so as to entitle him to vote at said town meeting by reason of his presence as an inmate of said institution," should have been answered in the negative, and it is so answered by this court.

It follows that the judgment of the court below should be reversed and judgment ordered for the defendants, with costs of all courts in their favor and against the plaintiff.

All concur.

Judgment accordingly.

THOMAS J. POPE et al., Respondents, v. THE TERRE HAUTE
CAR AND MANUFACTURING COMPANY, Appellant.

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164	191

Where an executory contract for the sale of goods contains no provision as to the time when delivery is to be made by the vendor, its legal effect is an agreement to deliver within a reasonable time, and in an action brought by him against the purchaser for failure of the latter to perform, where by the terms of the contract payment is to be made upon delivery, plaintiff must allege in his complaint and prove upon the trial performance or offer to perform on his part within a reasonable time.

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Where the complaint in such an action omitted to allege a tender of the goods in a reasonable time, and upon motion to dismiss the complaint because of the omission, plaintiffs did not offer to amend and no amendment was made at any stage of the trial or proof given showing that the tender was in a reasonable time. *Held*, that the denial of the motion was error, requiring a reversal.

Also, *held*, the defect in the complaint was not waived by the failure to take the objection by demurrer or answer. (Code of Civil Pro. § 499.)

(Argued June 30, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 27, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for an alleged breach of a contract of purchase and sale.

The complaint alleged, in substance, that plaintiff, under the firm name of Thomas Pope & Brother, sold to defendant on or about February 2, 1880, and said defendant purchased "300 tons No. 1 Calder iron at a price specified," to be delivered in bond at New Orleans. That said iron is Scotch iron which has to be imported from Scotland, and said sale was made subject to ocean risks. That defendant made and signed a note or memorandum in writing, known as "a bought and sold note," which contained all the material facts of the purchase and sale. That plaintiffs "duly ordered the shipment of said iron. That the same arrived safely in New Orleans and was there placed in bond," of which fact plaintiffs notified defendant and tendered delivery of said iron and demanded payment therefor, but defendant refused to receive or pay for the same. A motion was made to dismiss the complaint on the trial as stated in the opinion. The "bought and sold note" was offered in evidence, of which the following is a copy:

"SALE MEMO.

"St. Louis, Feb'y 2d, 1880.

"Sold Terre Haute Car & M'fg Co. for account Pope &

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Bro., 300 tons No. 1 Calder, at \$29 cash, in bond, New Orleans, subject to ocean risks.

Accepted:

"T. H. C. & MFG CO.,

"By J. B. HAGER, Pt."

The iron not having been ready for delivery by the 3d of May, 1880, the defendant on that day wrote the following letter, which was received by plaintiffs' brokers:

"May 3d, '80.

"Messrs. MILLARD & COMBS,

"St. Louis.

"GENTS:—The contract made with you on account of Pope & Bro., dated Feb'y 2, 1880, for three hundred tons No. 1 Calder, and good for three months, not having been complied with on your part, we hereby notify you that we no longer consider the contract binding upon either party.

"Very truly,

"THE TERRE HAUTE CAR & MFG CO.,

"By J. G. HAGER, Prest."

The iron afterwards arrived, and the following letter was thereupon, and on the 14th day of June, 1880, written by the brokers to the defendant, offering its delivery:

"We are instructed by Messrs. Thomas J. Pope & Bro., to demand of you the acceptance of three hundred tons No. 1 Calder, sold to you Feb'y 2d, and which they are now ready to deliver at New Orleans, and have been since June 14th. We therefore demand that you receive the iron and pay for the same."

Defendant declined to accept delivery.

Stephen O. Lockwood for appellant. The complaint is defective in that it does not allege when the contract was to be performed, or performance, or offer or tender of performance within the time provided by the contract. (*Osborne v. Lawrence*, 9 Wend. 135, 137; *Coonley v. Anderson*, 1 Hill, 519; *Duncan v. Topham*, 8 Com. B. 225; *Morton v. Lamb*,

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7 Term. R. 125; Benj. on Sales, § 683 and note; Chitty on Cont. 629, note, etc.; 2 Par. on Cont. [6th ed.] 660; *Cocker v. Franklin H. & F. Co.*, 3 Sumn. 530; *Tuffits v. McClure*, 40 Ia. 317; *Rankin v. Goddard*, 4 Allen [N. B.] 155; *Kemple v. Darrow*, 39 N. Y. Super. 447; *Ballou v. Biddle*, 35 Mich. 13; 1 Par. on Cont. 530; *Langfort v. Tyler*, 1 Salk. 113; *Lanyon v. Toogood*, 13 M. & W. 27; *Fletcher v. Cole*, 23 Vt. 114.) The full performance by the plaintiffs is a condition precedent to their right to recover against the defendant. (*Osborne v. Lawrence*, 9 Wend. 135; *Coonley v. Anderson*, 1 Hill, 519; *Pope v. Porter*, 102 N. Y. 366; *Hill v. Blake*, 97 id. 216; *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, id. 213; *Bowes v. Shand*, 2 App. Cas. 455.) It is only where the answer contains an affirmative allegation of the fact which the complaint should have averred that the court will deem the defect in the complaint cured. (*Schofield v. Whitelegge*, 49 N. Y. 259; *Tooker v. Arnoux*, 76 id. 397; *Bate v. Graham*, 11 id. 237; *Coffin v. Reynolds*, 37 id. 640; *Emory v. Pease*, 20 id. 62; *Pelton v. Ward*, 3 Cai. 73.) The correctness of the ruling denying the motion to dismiss must be tested on appeal on the complaint as it stood, not as it might have been changed by amendment. (*Tooker v. Arnoux*, 76 N. Y. 307.) Tender of delivery of the iron, according to the terms of the contract, was a condition precedent to the right of the plaintiffs to recover. (*Pope v. Porter*, 102 N. Y. 366; *Hill v. Blake*, 97 id. 216; *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, id. 213.) "Reasonable time" after the time of making the contract is what is meant, and it is to be measured upon the facts and circumstances of each case. (*Jones v. Fowler*, 1 Sweeney, 5; *Cocker v. F. H., etc., Co.*, 3 Sumn. 530; Abb. Tr. Ev. 371; *Hyd. En. Co. v. McHaffie*, 27 Week. Rep. 222; *Stewart v. Marvel*, 101 N. Y. 357; Benj. on Sales, 682 § 683; *Ellis v. Thompson*, 3 M. & W. 445; *Jones v. Gibbon*, 8 Ex. 920; *Sampson v. Rhodes*, 8 Scott, 544; *Crocker v. Franklin, etc., Co.*, 3 Sumn. 530, 533; 3 Par. on Cont. 540; *Davis v. Talcott*, 14 Barb. 611; *R. R. Co. v. Smith*, 21 Wall. 162.)

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Wm. W. Niles for respondents. The denial in the answer upon information and belief of the allegation of the offer and acceptance which preceded the sale is not sufficient. (*Schroeder v. Wanzer*, 22 N. Y. Week. Dig. 10.) It was proper to prove the value of the iron within a reasonable time and at the market of delivery. (*Harris v. P. R. R. Co.*, 58 N. Y. 660; *Price v. Manley*, 66 id. 82.)

ANDREWS, J. The defendant's counsel, on the opening of the case, moved to dismiss the complaint on the grounds (1) that it did not allege when the contract was to be performed, and (2) that it did not allege performance, or offer or tender of performance within the time. The court denied the motion and exception was taken. The plaintiffs did not offer to amend the complaint and no amendment was made at any stage of the trial. We think the motion should have been granted. There is no allegation in the complaint as to the time within which the contract was to be performed by delivery of the iron, and no time is mentioned in the written contract. The law supplies the omitted term, and the contract in legal effect was an engagement on the part of the plaintiffs to deliver within a reasonable time. (Benjamin on Sales, § 683, note and cases cited; 2 Pars. on Con. 535, and cases cited.) The promise of the plaintiffs to sell and deliver the iron, and of the defendant to receive and pay therefor were mutual and concurrent and neither party can maintain an action against the other for a breach of the contract without proving performance on his part. It was, therefore, necessary, as matter of proof, that the plaintiff should show that he delivered, or offered to deliver, the iron within a reasonable time, for this was his contract, and whatever is essential to a cause of action must be averred. The principle is very clearly stated in *Osborne v. Lawrence* (9 Wend. 135), in which the court say: "The time when a promise is to be performed is always material and must be stated according to the truth, and proved as stated, whether it be upon the request of the plaintiff, or upon a particular day, or in a reasonable time." The com-

plaint alleges that the iron arrived in New Orleans and that the plaintiffs notified the defendant and tendered delivery and demanded payment. But there is no averment when the iron arrived, or was tendered, or when by the contract it was to be delivered, or that delivery was tendered within a reasonable time, nor is any fact stated from which it can be inferred that the plaintiffs in that respect had performed their contract. The allegation that the plaintiffs "duly ordered the shipment" does not answer their obligation. Their contract was to deliver in a reasonable time, and the undertaking and its performance should have been alleged. The circumstance that they "duly ordered the shipment," or that the vessel was delayed by stress of weather, or similar facts, might have been relevant on the issue of performance. The difficulty is that the complaint does not show that the defendant was bound to accept or pay for the iron, because it neither sets out the plaintiffs' undertaking as to the time of delivery, or its performance, which was, in part, the consideration of the promise of the defendant. The defect in the complaint was not waived because the objection was not taken by demurrer or answer. (Code, § 499.) The plaintiffs did not apply for an amendment, but took the risk of the sufficiency of the complaint, and cannot on this appeal be relieved from their position. (*Tooker v. Arnoux*, 76 N. Y. 397; *Southwick v. First Nat. Bank*, 84 id. 420.)

Other questions have been argued, but as the point already considered is decisive of this appeal, it becomes unnecessary to consider them.

The judgment should be reversed, and a new trial ordered.
All concur.

Judgment reversed.

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CAROLINE C. PIPER, Appellant, v. JOHN L. HOARD,
Respondent.

If, at the time of the discovery of a fraud, the party injured has a legal capacity to act and to contract, his right of action accrues and the statute of limitations begins to run against it, irrespective of the degree of intelligence possessed by him, or of his freedom from undue influence, or his ability to resist it.

The fact, therefore, that the person injured was, after a discovery of fraud, induced by other fraudulent representations, or by undue influence, to refrain from prosecuting until the time limited by the statute has expired, is no answer to a plea of the statute. It must be made to appear that at the time of the discovery he had not the legal capacity to act.

Accordingly *held*, where the owner of real estate was induced to convey the same by fraudulent representations and undue influence on the part of the grantee, and after discovery of the fraud commenced an action against the grantee to set aside the conveyance because thereof, but was induced by further fraudulent representations and undue influence to discontinue the same, that another action to set aside said conveyance, commenced more than ten years after the discovery of the original fraud, was barred by the statute.

(Argued April 21, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 13, 1885, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought in February, 1881. The nature of it and the material facts are stated in the opinion.

A. M. Beardsley for appellant. The complaint was sufficient to present the fraudulent representations, as a cause of action and ground of recovery on behalf of the plaintiff. (*Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, 290; *Russell v. Brownell*, 20 N. Y. W. Dig. 504; *Hammersley v. DeBiel*, 12 Cl. & Finn. 46; *Pomeroy on Spec. Perf.* § 328; 2 Kent's Com. [12th ed.] 172, 173 m. p.; *Hennsden v. Cheney*, 2 Vern. 150; *Montefiori v. Montefiori*, 1 W. Blacks. 363, 364; *Berrisford v.*

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Milward, 2 Atk. 49; Atherly on Family Set. 27; Law Lib., chaps. 34, 35, m. p. 484-500; 1 Story's Com. on Eq. §§ 271, 387; *Storrs v. Baker*, 6 Johns. Ch. 173; *Redmond v. Redmond*, 1 Vern. 347; *Neville v. Wilkinson*, 1 Brown's Ch. C. 543; *Harvey v. Ashley*, 3 Atk. 607, 610; *Lamlee v. Haanman*, 2 Vern. 499; *Webber v. Farmer*, 4 Brown's Parl. C. 170; *Scott v. Scott*, 1 Cox, 366.) If the facts set forth in the complaint entitle the plaintiff to any relief, legal or equitable, her action will not fail. (*Price v. Brown*, 10 Abb. N. C. 67; *Hall v. Hall*, 38 How. Pr. 97.) The findings of fact and conclusions of law of the court below, that the statute of limitations was a bar to this action, were erroneous. (*Guillotel v. Mayor, etc.*, 25 Alb. L. J. 315; 87 N. Y. 441; *Gates v. Andrews*, 37 id. 657; 5 Mason C. C. Rep. 154; *Sears v. Shafer*, 2 Seld. 268; *Sands v. St. John*, 36 Barb. 628; *Sharp v. Leach*, 31 Beav. 491.) Direct evidence of undue influence is not necessary. It may be, and most frequently is, a legitimate inference from the facts and circumstances in the case. (*Reynolds v. Root*, 62 Barb. 250; *Gowland v. De Faria*, 17 Ves. 25; Kerr on Fraud and Mistake, 301; 35 N. Y. 594; 2 Seld. 272; 65 Barb. 346, 356; 73 N. Y. 502; 75 id. 99; *Cook v. La Motte*, 15 Beav. 234, 240; 1 Greenl. Ev. § 42; Best on Presump. 187; 2 Pothier on Oblig. [Evans' ed.] 252, 253; 1 Starkie Ev. 37; *Oliver v. Berry*, 53 Me. 206; Cow. & H. Notes, 298; Best on Presump. [Morgan's Notes] §§ 321, 405; Best on Presump. 203 and marg.; *Sharp v. Leach*, 31 Beav. 491; *Oldham v. Oldham*, 5 Jones' Eq. 89 [N. Car.]; Dwarries on Stat. 637, 712, marg.; *Hardman v. Bower*, 39 N. Y. 198.)

A. H. Prescott for respondent. The grantor was, in all respects, legally competent to make the deed to the defendant. (*Blanchard v. Nestle*, 3 Denio, 37.) Our law does not distinguish between different degrees of intelligence; it does not deny to a man of very feeble mind the right to make contracts and manage his own affairs; in the absence of fraud, proof of mere imbecility in the grantor, however great it may be, will not avoid his deed; there must be a total want of understanding.

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(*Jackson v. King*, 4 Cow. 207; *Stewart v. Lispenard*, 26 Wend. 255; *Delafield v. Parish*, 28 N. Y. 7; *Van Guysling v. Van Keuren*, 35 id. 70; *Jackson v. Van Deusen*, 5 Johns. 144, 157.) In all cases where the plaintiff has concurrent remedies at law or in equity the limitation is six years. (*Foot v. Farrington*, 41 N. Y. 164; *Loder v. Hatfield*, 71 id. 92; *Sanford v. Sanford*, 62 id. 553; *Miner v. Beekman*, 50 id. 337; *Hubbell v. Sibley*, id. 468; *Roberts v. Sykes*, 8 Abb. 345; *Bruce v. Tilson*, 25 N. Y. 194.) The cause of action accrued when the defendant took possession under his deed in 1859. (*Mayne v. Griswold*, 3 Sandf. 464; Code, § 106; Hood on Lim. of Act. § 106.) When the statute has begun to run against the ancestor, it is not suspended by any statutory disability in the heir at the time of the descent cast. (*Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462.) The question as to disabilities is one of legislative power, and does not belong to the courts. (Banning on Lim. 85; Wood on Lim. 496.)

FINCH, J. The facts of this case are only important as they bear upon the inquiry when the cause of action accrued, and the statute of limitations began to run. The plaintiff, as sole heir of her father, seeks to set aside a deed made by him in February, 1859, to the defendant, and a subsequent settlement which confirmed it, on the ground that both were the product of fraud and undue influence. A jury to whom special issues were submitted decided the facts in favor of the plaintiff, and their conclusion was adopted by the court. We are to assume, therefore, that the deed and the settlement were fraudulent, and might have been avoided by Frederick Piper in his lifetime at any moment after they came into existence. But the action is conceded to have been of a character solely cognizable in equity, and founded upon a fraud, and the statute did not begin to run until the discovery of that fraud. The trial judge found as a fact that, for a period of sixteen years before his death, Frederick Piper could have maintained an action for the same substantial relief now sought; and it is involved

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in that finding and more plainly disclosed in the opinion that during all that time he had a full knowledge of the facts constituting the fraud. While he was somewhat weak-minded, he was by no means destitute of mental capacity or understanding, and was able to know and comprehend the facts which transpired. He knew that he made the deed to Hoard, and the consideration for it. He knew also, for he was expressly told, that the conveyance could be avoided for fraud; and after the whole matter had been explained to him, not only by his wife but by the counsel chosen to protect and enforce his rights, he gave his consent to the commencement of an action which alleged that fraud and sought to rectify it. At that date he knew all the facts and their wrongful and fraudulent character. The only influence then operating upon him was the perfectly proper influence of his wife and his counsel. Mr. Throop testifies that the whole situation was explained to him; that he was made to understand it, although with some difficulty and delay; and that when he did consent he answered intelligently and rationally. This witness was the first one called on behalf of the plaintiff, and was the counsel chosen to redress the existing wrong. The fraud at that moment was complete. It had been discovered, and was fully known to Piper and his advisers; so fully that it served to found an action in his behalf as complete in its allegations of fraud and undue influence as the one before us. The statute of limitations began then to run, and of course continued to run unless stopped by some statutory provision. (Code of Civ. Pro. § 408.) It may be true, and doubtless is true, that Piper did not realize as clearly and distinctly as others the force of the facts brought to his knowledge, and the extent and scope of the wrong which had been done him. But he was neither idiot nor lunatic; he had memory, sense and judgment; a mental capacity of low grade and a lack of independence and will, but yet sufficient ability to understand and comprehend; and that supplemented by the aid and advice of intelligent and competent friends. It is impossible not to see that at this point of time a discovery of the fraud had

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occurred. I do not understand that the question whether such a discovery has taken place depends upon the mental condition of the party injured, where he has legal capacity to act and to contract, nor upon his freedom from undue influence or ability to resist it. If he has ascertained the facts which constitute the fraud and so has discovered its existence, the statute begins to run irrespective of the degree of intelligence possessed by the injured party, and whether he has enough of courage and independence to resist a hostile influence, and assert his rights or not. In either event there has been discovery of the fraud; the right of action has fully accrued; and the statute begins to run. Soon after the action of Frederick Piper to cancel the deed had been commenced, the defendant Hoard seems to have regained his influence and control over him. The defendant induced him to discontinue his action; making a new arrangement to which the wife was a party; and assuming a new liability as a consideration for the conveyance. This settlement the jury and the court found was itself fraudulent. It indicates a new exertion of undue influence to nullify and avert the grantor's effort for redress. That finding leaves the original fraud unpurged, and the right of action it gave undischarged, but I am unable to see how it could stop the running of the statute of limitations. The law provides for no such disability. We cannot add it to the statute. The new wrong might possibly give a new right of action, but could not suspend the existence of the old one. The cases cited in behalf of the plaintiff do not reach the difficulty. Most of them relate merely to the effect of laches or acquiescence as excused or disarmed by the continued presence of undue influence, and have no relation to the peremptory command of a statute. (*Sharp v. Leach*, 31 Beavan, 491; *Gowland v. De Faria*, 17 Vesey, 25; *Kerr on Fraud*, 301.) In one the question arose over the adverse possession of a slave under a statute of the State; and the actual possession was held not to be adverse, because of a continued undue influence which prevented consciousness of any adverse character attending the possession. (*Oldham v. Oldham*, 5 Jones N. C. Eq., 89.) Here the

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statute began to run. There was a time when Piper discovered the fraud; when the facts and their character were explained to him; when he was for the moment free from the domination of Hoard, and acting in defiance of it; and when he consented to initiate an action to set aside the deed. We cannot justly say that he did not then and there not only discover but realize to some extent the fraud practiced upon him. That set the statute running, and it continued to run unless we import into it a new disability not among its terms. (Code of Civ. Pro. § 396.) We therefore see no answer to the defense of the statute.

It was sufficiently pleaded. The Code provides that the right of action is deemed to have accrued when the fraud is discovered and not sooner (§ 382), and the answer pleads that it did not accrue within six years before the commencement of the action. That was enough.

It is claimed, in addition, that the complaint contained a cause of action in the plaintiff's own right, and not derived from her father, and which she asserted in due season after the disability of infancy was ended. That cause of action is said to exist in the false representations made to her mother by Hoard, to induce the marriage contract and which he could be required to make good to the issue of the marriage. But the complaint does not rest upon any such right. That cause of action concedes the validity of the deed to Hoard, and seeks to impose a trust upon the property conveyed by it and is utterly inconsistent with the allegations of the complaint, which deny wholly the validity of the conveyance and the legal title of Hoard. The suggested cause of action was very properly made the subject of a new suit which is itself before us on appeal, and should not be further considered here.

The judgment should be affirmed with costs.

All concur, except EARL, J., not sitting.

Judgment affirmed.

Statement of case.

CAROLINE C. PIPER, Respondent, v. JOHN L. HOARD,
Appellant.

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107 73

155 254

Plaintiff's complaint alleged, in substance, that A. died seized of certain real estate which he devised to his two sons, J. and F., subject to the limitation as to F. that if he should die without issue his share should go to J. and his heirs; that F. conveyed his interest to defendant, who subsequently induced C., plaintiff's mother, to marry F. by means of the false and fraudulent representations that F. had a fine property so left to him that if he married and had an heir the land would go to the heir. The complaint further alleged that plaintiff was the only child of such marriage; that the real estate was partitioned between J. and defendant as the grantee of F., and defendant since then has occupied and still occupies and claims to own the part set off to him. The relief asked was that plaintiff be declared the owner of the portion so set off to defendant and be placed in possession thereof. On demurrer to the complaint *held*, that it set forth a good equitable cause of action and the demurrer was properly overruled; that defendant was bound by his representations and must be considered as holding the property as trustee *ex maleficio*; and so, should be held to make good the thing to plaintiff, who would have had the property had the representations been true; that it was immaterial that plaintiff was not living at the time the representations were made, as they were made in her favor and enure to her benefit; and that the question was not affected by the fact that plaintiff's mother was induced to agree to the marriage by purely mercenary considerations.

The law of marriage as administered by courts, so far as property interests are concerned is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance.

The distinction between the legal and equitable rules applicable to contracts and negotiations in reference to marriage, and those as to other matters pointed out.

(Argued April 22, 1887; decided October 11, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 13, 1885, which affirmed a judgment in favor of plaintiff entered upon an order overruling a demurrer to the complaint herein.

The substance of the complaint is set forth in the opinion.

Opinion of the Court, per PECKHAM, J.

C. D. Adams for appellant. Equity cannot interfere to relieve plaintiff from the consequences of her mother's design. (Perry on Trusts, § 173.) A constructive trust arises only in favor of the particular person upon whom the supposed fraud is practiced. The law interferes to imply a trust, only where it is absolutely necessary to do justice. (Hill on Trustees, 144 and notes; Story's Eq., § 184; Perry on Trusts, §§ 166, 168, 173; 75 N. Y. 244; 11 Hun, 406; 1 Abb. N. C. 136, *n*.) There was never a trust in plaintiff's favor. A trust to issue of marriage can only come through a marriage settlement. It cannot come through a tort, a fraud practiced upon the mother before marriage by a third person against him. (Perry on Trusts, § 874; Tyler on Coverture, 460, 461.) This case is not a fraud on marriage negotiations, within the jurisdiction of equity. (Perry on Trusts, § 208; Story Eq., § 268; Tiffany & Bullard, 121, etc.; Bacon's Abr. Marriage B.; 2 Beav. 1; 15 id. 341; 3 id. 469; 31 Eng. L. & Eq. 9; 6 J. Ch. 173; Pom. on Spec. Perf., § 328; 1 Abb. N. C. 136, *n*.)

A. M. Beardsly for respondent. Defendant perpetrated a fraud upon plaintiff's mother on the marriage of plaintiff's parents and upon plaintiff who claims thereunder and he is bound to make the thing good according to his representations. (*Montefiori v. Montefiori*, 1 Wm. Blacks. 364; *Berrisford v. Milward* 2 Atk. 49; *Hunsden v. Cheney*, 2 Vern. 150, Marg.; *Storrs v. Barker*, 6 Johns. Ch. 166, 173; *Neville v. Wilkinson*, Brown's Ch. C. 543-546; *Hammersley v. De Reil*, 12 Clark & F. 46; *Redmon v. Redmon*, 1 Vern. 347; *Harvey v. Ashley*, 3 Atk. 607, 610; Pom. on Spec. Perf. Cont., § 328 & *n*; *Lamlee v. Hauman*, 2 Vern. 499; 1 Story's Com. on Eq., §§ 271, 387, *n*; Atherly on Fam. Set.; 27 Law Lib., chaps. 34, 35, m. p. 484-500; *Scott v. Scott*, 1 Cox, 366; *Webber v. Farmer*, 4 Brown's Parl. C. 170.)

PECKHAM, J. This case comes here upon a demurrer to the plaintiff's complaint as not stating facts sufficient to constitute a cause of action. The Special Term overruled the demurrer

Opinion of the Court, per PECKHAM, J.

and granted defendant leave to answer upon payment of costs. This privilege the defendant refused to avail himself of and final judgment was duly entered against him. He appealed therefrom to the General Term, where the judgment was affirmed, with costs, and leave was again granted him to answer on payment of costs, and again the privilege was refused, when final judgment of affirmance being entered the defendant appealed to this court.

The complaint develops a curious state of facts. Its material averments are as follows: The plaintiff resides in the city of Utica and the defendant in Herkimer county. In 1842 one Andrew Piper died, a resident of that county, leaving a will which was duly proved, and by which he left all his property, including the farm in question, to his two sons, James and Frederick, and subject to the limitation in the case of Frederick, that if he should die without issue the portion of the estate devised to him should belong, and was thereby devised, to the brother James and his heirs. James and Frederick took possession of the farm (which consisted of 140 acres in Herkimer county), and continued to own it together until March 26, 1859, when Frederick conveyed his interest therein to defendant, who had, prior to 1859, married a niece of Frederick. In 1875 Frederick died. After defendant had procured a deed of his interest from Frederick in the farm above mentioned the defendant went to Utica to see one Catharine Hogel for the purpose of bringing about a marriage between her and Frederick, and thus procuring an heir to him, and defendant persuaded Catharine to go and see Frederick, defendant paying the expenses of the trip. In order to persuade Catharine to marry Frederick, and in the course of his efforts in that direction, and referring to the interest of Frederick in the farm, the defendant falsely and fraudulently represented to her that Frederick had a fine property so left to him that if he married and had an heir the land would go to the heir. That, induced by such statements and representations made to her by the defendant, Catharine did marry Frederick on the 11th day of April, 1859, the result of which marriage was the birth of

Opinion of the Court, per PECKHAM, J.

the plaintiff within a year thereafter, and she is the only child of such marriage.

In September, 1859, the farm was duly partitioned between James Piper and the defendant, as the grantee of Frederick, by an interchange of deeds conveying the respective parts, and the defendant, since such conveyance, has occupied the part set off to him as the owner thereof, and still occupies and claims to own it. The relief prayed for was that plaintiff be declared the owner of the portion of the farm set off by partition to the defendant, and that plaintiff be placed in possession of the same. The judgments appealed from grant such relief, and defendant asks for their reversal while admitting the facts above stated. There was no opinion written by the learned judges at the Special or General Term, and we have not the benefit of their views upon this question.

The defendant, while confessing that he procured the fee of the farm (through this marriage) owned by the plaintiff's father, by means of his own fraudulent representations, yet claims that the plaintiff has no right of action against him on that account, because there is a lack of privity between him and plaintiff, and that plaintiff was not induced to any action by reason of his fraud and sustained no legal damage therefrom, and cannot, therefore, recover any from him, but must sit by and permit the land once owned by her father to be enjoyed by defendant, although procured by him by means of this fraud.

If to assume jurisdiction and grant relief in such a case would be to run counter to well-settled rules of equity, that fact would be a sufficient answer to the plaintiff's prayer for judgment herein. But if the most that can be said is that the case is novel and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment. The spectacle of an individual enjoying property acquired by means of an admitted fraud is not one which appeals with any great force to the sympathies of a court in a civilized land in behalf of the perpetrator of the fraud. Such fraud is not in the least mitigated in its

Opinion of the Court, per PECKHAM, J.

character by the statement that it consisted of fraudulent representations made to a woman to induce her to consent to a marriage in which the mercenary motive was the strong if not the only one. The fact that she was ready and desirous of bettering her condition, even though it was by a mercenary marriage, does not alter the other fact that the defendant enjoys property which he has acquired by the successful perpetration of a fraud, and which, if the fraudulent representations by which he acquired it had been true, the plaintiff herein would be herself entitled to enjoy as owner.

Marriage has its sentimental and business sides. Courts have very little to do with the former. The whole law of marriage as administered by courts (so far as property interests are concerned) is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance. To say of plaintiff's mother, therefore, that she was too ready to marry a man because of the money he had or would necessarily leave to a child of the marriage, or that she was an adventuress, induced to marry solely by fraudulent representations as to the pecuniary condition of her husband, does not, as I have said, furnish the least reason for refusing relief to plaintiff if she be otherwise entitled to it. If her mother had not been induced to marry by any such pecuniary considerations, clearly no cause of action would exist. It is because such considerations were the moving ones, and were induced by the fraud of defendant, that the plaintiff bases her right of action. There are some anomalies in the law relative to contracts or negotiations having marriage for their consideration, and such contracts are based upon considerations which obtain in no other contract. The family relations and their regulation are so much a matter of public policy that the law in relation to them is based on principles not applicable in other cases; and all business negotiations having marriage for their end are regarded in much the same light by our courts. Thus a *particeps criminis* in the fraud has been permitted to recover in his own name against one who was no more guilty

Opinion of the Court, per PECKHAM, J.

than he, when the marriage had taken place by reason of such fraud.

In *Neville v. Wilkinson* (1 Brown Ch. 543), decided in 1782, the plaintiff was the individual who desired to marry his co-plaintiff's daughter, and he and the defendant, who was an attorney to whom he owed a large amount of money, agreed that defendant should represent to the father that the debt was much less than in truth it was. He did so, and after marriage he brought an action on a bond which would have made the debt in excess of the amount represented, and the plaintiff, the *particeps criminis*, was permitted to succeed in an action brought by him and his father-in-law to compel the surrender of the bond. The case is not cited as analogous to the one under discussion, but as proof of the statement that there are anomalies in this branch of the law. The reason has been already stated.

In *Roberts v. Roberts* (3 P. Wms. 66), decided in 1730, A. had treated for the marriage of his son, and, in the settlement on the son, a power was reserved to the father to jointure any wife whom he should marry in £200 per annum, in which case he was to pay the son £1,000. The father subsequently desired to marry a second time, and the son agreed with the second wife's relations to release the £1,000 and did release it but took a private bond back from the father for its payment. It was held that equity would not set aside the private bond, because it would be injurious to the son's wife whose marriage had taken place prior to the second one of the father, and being prior in point of time its equity must prevail. The master of the rolls said that the same arguments advanced to show that the bond should be discharged as an injustice to the second wife showed it should be paid or equal injustice would occur to the son's wife, and the maxim *qui prior est in tempore*, etc., should prevail. He also said that equity abhors all underhanded agreements in cases of marriage, "and, perhaps, this may be the only instance in equity where a person, though *particeps criminis*, shall yet be allowed to avoid his own acts." Many other cases of a similar nature might be cited.

Opinion of the Court, per PECKHAM, J.

Although these are instances of fraud arising in relation to marriage settlements, it is not perceived why courts may not go a step further in the same direction and permit a recovery on the part of a person situated like the plaintiff. The anomaly would be no greater in this case than in the others, and a man holding property through fraud would be compelled to give it up to the person who would be entitled to it if he had spoken the truth.

Under marriage settlements it is held the issue take their interests therein as purchasers under both parents, and hence may compel the payment into the fund by the promisors on the part of the wife, although those on the part of the husband had failed to pay in what they promised, because non-performance on one part shall be no impediment to the childrens receiving the full benefit of the settlement. (See *Harvey v. Ashley*, 3 Atk. 607, 611.) The action is sustained on the ground that the settlement was something in which the children were interested, and were privy to the party promising. Is there not sufficient privity in such a case as this between the defendant and the issue of the marriage induced by his fraud where the fraud consists of false and fraudulent representations made by him to the mother, which, if true, would entitle the issue to the ownership of the very property which he holds by virtue of such fraud? We think these facts create sufficient privity between the parties to sustain such an action as this. It is true the plaintiff was not born when the fraudulent representations were made. Still they were made by defendant to plaintiff's mother for the purpose of inducing a marriage between the parents, and if they had been true the plaintiff would have been the owner of this particular property. In this way she is the very person injured by the fraud, and although not individually in the mind of defendant when he perpetrated that fraud, yet, as filling the position of heir to her father, she belongs to the class which defendant had in contemplation when he represented to the mother that the heir of Frederick would have the farm. In this way it may be claimed that defendant had in view the plaintiff and the rights

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he alleged she would have. Why should not the plaintiff be permitted to hold the defendant to his representations? The English courts have held that a person, who, by acts or speech, represents property as belonging to the proposed husband, when the possession thereof forms an inducement to the marriage, shall be bound to make good the thing in the manner represented. Such is the case of *Montefiori v. Montefiori* (1 Wm. Blackstone, 363, Easter Term, 1762, MANSFIELD, Ch. J.)

The facts of the case were these: Montefiori being engaged in a marriage treaty, his brother Moses to assist him in his designs and represent him as a man of fortune, gave him a note for a large amount of money as the balance of accounts between him and his brother Joseph, which balance he acknowledged to have in his hands, though in truth none existed. This note was shown by Joseph to the parents of the intended wife and was an inducement to the marriage. After the marriage Moses desired to reclaim the note so given without consideration and the matter was referred to arbitration, and the arbitrators awarded the note to be given up, which Joseph refused to do, and the case then came up on motion for an attachment against Joseph for non performance of the award, and Joseph made a cross motion to set aside the award. Chief Justice MANSFIELD held that where there were proposals of marriage and third persons represented anything in a light different from the truth, even though by collusion with the husband, they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be, and the husband alone shall be entitled to relief as well as when the fortune has been specifically settled on the wife.

Atherly in his work on Marriage Settlements (27 Law Library, Chap. 34, marginal paging 484), after citing the above case says that the principle upon which the court proceeds in such cases, when the thing is not actually made the subject of the settlement, must be this, as he conceives, that as the wife must be presumed to agree to the marriage as well in expectation of the present support which she and her children will receive from her husband, as of the provision which he may

Opinion of the Court, per PECKHAM, J.

have made for them after his death, that a person who has been at all concerned in raising such expectation shall not be suffered in anywise to disappoint it.

Here in the case at bar it is necessary to take but one further step in order to maintain the action. It is only necessary to hold that the issue of the marriage which was brought about by the falsehood and fraud of the defendant shall be able to call him to account for such fraud and bind him to make good the thing in the manner in which he represented it, so that it shall be as he represented it to be. We see no reason why such step should not be taken. There is certainly none in the position of the defendant who stands before the court the possessor of property by reason of his fraud, which property, if it were as it was represented by defendant, would belong to the plaintiff herein. She can claim to be in privity with defendant, although he made the representations to her mother, because she is the child of the marriage brought about by the fraud of the defendant practiced upon the mother, and because she would be the owner of this property if the facts were as they were represented by the defendant to the mother.

It is true her own action was in no wise influenced by these representations for she was not then born. But where, in the peculiar and anomalous rules obtaining in that branch of the law regarding marriage, marriage settlements and frauds in relation thereto, a marriage is induced under circumstances, such as exist in this case, we think there is no trouble in holding the defendant bound by his representations, and that, in the character of a trustee *ex maleficio*, he shall be held to make good the thing to the person who would have the property, if the fact were as he represented it, assuming such person to be the fruit of the marriage brought about by those very representations.

The leading principle of this remedial justice is, by way of equitable construction, to convert the fraudulent holder of property into a trustee and to preserve the property itself as a fund for the purpose of recompense. (Perry on Trusts, § 170.)

There is no legal objection towards constituting such a trustee

Opinion of the Court, per PECKHAM, J.

in favor of one who was not *in esse* when the fraud was perpetrated, so long as it can be seen that such person seeks to take the property which the defendant holds by virtue of his fraud, and which such person would be entitled to hold if the representations the defendant made in regard to it were true. Equity will fasten upon a legatee or devisee the character of a trustee, *ex maleficio*, where he procured the legacy or devise by fraudulently promising the testator to apply it for the benefit of others. (See cases cited *In Matter of Will of O'Hara*, 95 N. Y. 403, 412, 413.) The principle would be just as applicable if the fraudulent legatee had made the promise by which the legacy was procured for the benefit of some one thereafter to be born. The refusal to perform after the party comes into existence would be just as much a fraud as if refusal were in regard to one existing when the promise was made.

In the case last cited, regarding the will of O'Hara (*supra*), the legatees were converted into trustees *ex maleficio* in favor of the heirs-at-law and next of kin of the testatrix, not one of whom, perhaps, was living at the time the will was executed and the promise made. There can be no objection, therefore, to holding this defendant as such trustee, based upon the fact that when he made the false representations the plaintiff was not living. They were made in her favor and they can enure to her benefit.

By a decision of this case in this manner we think at least the cause of common honesty and decent morals is upheld, while at the same time no rule of law or equity is violated. The facts, as we have said, are quite novel in their character, and the result is that a man who has procured property by fraud is prevented by a court of justice from further enjoying it, and compelled to surrender it to one who is the daughter of the person from whom he procured it, and who would be entitled to it if the representations which he made, and by which he now enjoys it, were true. Such a result cannot be other than satisfactory.

The defendant asks, if his demurrer be overruled in this

Statement of case.

court, that he be permitted to withdraw it and answer on payment of costs. He has twice refused this favor in the Supreme Court. We suppose that we have the power to grant it now under section 497 of the Code. Formerly, in such a case as this, it was decided that this court did not have the power to grant such leave. (*Whiting v. Mayor, etc., of N. Y.*, 37 N. Y. 600.)

Under the circumstances we do not think it would be well for us to grant the leave desired. Changes may have taken place since the action was commenced which might have weight in deciding the merits of the application, such as the loss of testimony on the part of the plaintiff, or other changes of that nature. Justice will be better attained by remitting that question to the Supreme Court where both sides may be heard upon an application and all the questions have appropriate consideration.

The judgment should, therefore, be affirmed, with costs, with leave to defendant to apply to the Supreme Court for leave to withdraw the demurrer and interpose an answer.

All concur, except RUGER, Ch. J., and ANDREWS, J., dissenting, and EARL, J., not sitting.

Judgment accordingly.

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136	822
107	88
1165	87

GEORGE H. KELLER et al., Respondents, v. DE WITT C. PAINE,
Appellant.

The liability of personal property situated in this state, but belonging to a non-resident, to be attached and sold under legal process is to be determined by the law of the state, not that of the jurisdiction where the owner lives. The general rule that the voluntary transfer of personal property wheresoever situated is to be governed by the law of the owner's domicile, always yields where the law and policy of the state where the property is actually located have provided a different rule of transfer from that of the state where the owner lives.

One F., a resident of Pennsylvania, on March 24, 1881, executed to plaintiffs, in that state, an instrument, in form an absolute bill of sale, but in fact given as a chattel mortgage on a canal boat owned by him, then

Statement of case.

lying in the Erie canal in the town of G. F. in this state. An agent of the mortgagee filed a copy of the mortgage on the next day in the town clerk's office of said town, and went on board the boat and assumed possession thereof. Defendant, however, had previously on the same day, as sheriff, levied upon the boat by virtue of an attachment against F., and subsequently sold it on execution. The mortgagee and attaching creditors were also residents of Pennsylvania. In an action for a conversion of the boat *held*, that both under the provisions of the Revised Statutes relating to chattel mortgages and the act in relation to liens on canal boats (§§ 1 and 2, Chap. 412, Laws of 1864), the instrument was void and plaintiffs were not entitled to recover.

Keller v. Paine (34 Hun, 167) reversed.

(Submitted April 27, 1887; decided October 4, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made October 7, 1884, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 34 Hun, 167.)

The nature of the action and the material facts are stated in the opinion.

Thomas Richardson for appellant. The instrument purporting to convey title from Fink to the plaintiffs was a chattel mortgage. (*Kilburn v. Low*, 25 Hun, 61; 12 N. Y. Week. Dig. 556; *Smith v. Beatie*, 31 N. Y. 542.) It was void by the laws of New York as against the plaintiffs in this attachment proceeding, by reason of its not having been filed in the town clerk's office, and no possession having been taken before the levy. (*Whiteman v. Connor*, 40 N. Y. Super. Ct. 339; *Hathaway v. Howell*, 54 N. Y. 97; *Thomas on Mort.* 505; *Laws of 1833*, chap. 279, § 1; *Clark v. Gilbert*, 14 N. Y. Week. Dig. 241; *Green v. Van Buskirk*, 7 Wall. 140, 151; *Guillander v. Howell*, 35 N. Y. 657; *Warner v. Jeffrey*, 96 id. 248.) If the instrument in question was a chattel mortgage, the plaintiffs basing their action upon a claim of absolute ownership, cannot recover in this action. (*Hudson v. Swan*, 83 N. Y. 552.) If it was a bill of sale absolute, the parties being all domiciled

Statement of case.

in Pennsylvania, and that being the place of contract, the law as to the validity of the contract will be governed by the law of that state. (*Clark v. Tucker*, 2 Sandf. 163; *Tyler v. Strang*, 21 Barb. 198; *Ockerman v. Cross*, 54 N. Y. 29; 40 Barb. 465; *Parsons v. Lyman*, 20 N. Y. 112; *Hoyt v. Thompson*, 5 id. 352; *Kelly v. Crapo*, 45 id. 86.) By the statute (13 Eliz. chap. 5), which is in force in Pennsylvania, to the effect that continuance in possession by the vendor or grantee is conclusive evidence of an intent to delay, hinder or defraud creditors, the bill of sale, whether absolute or chattel mortgage, was void as against the defendant herein under the attachment proceedings, as matter of law. (1 Smith's L. C. 72; *Clow v. Woods*, 5 S. & R. 275; *Babb v. Clauson*, 10 id. 419; *Streeper v. Eckhard*, 2 Whart. 30; *Steilwagon v. Jeffries*, 8 Wright, 407; *Brown v. Keller*, 7 id. 104; *McKibben v. Martin*, 14 P. F. Smith, 359.)

George W. Smith for respondents. A sale of a canal boat or other vessel lying in a distant port or state, gives the vendee title if he takes immediate steps and uses due diligence to obtain possession, and a creditor who seizes a vessel by an attachment issued after such a sale, and while the vendee is using reasonable diligence in taking possession, cannot divest the vendee's title. (*Vining v. Gilbraith*, 39 Me. 496; *Joy v. Sears*, 9 Pick. 4; *Badlam v. Tucker*, 1 id. 389; *Gardner v. Howland*, 2 id. 601, 602; 2 Kent's Com. 699; *Gibson v. Stevens*, 8 How U. S. 384; *Stanton v. Small*, 3 Sand. S. C. R. 230; 23 Vann, 88; *Lampriere v. Pasley*, 2 T. R. 485; *Carter v. Willard*, 19 Pick. 1-9; *Clow v. Woods*, 5 S. & R. 275; *Atkinson v. Maling*, 2 T. R. 466; *Mead v. Smith*, 16 Conn. 346; *Carter v. Willard*, 19 Pick. 12; *Turner v. Cooledge*, 2 Met. 350; *Ingraham v. Wheeler*, 6 Conn. 277; *Russell v. O'Brien*, 127 Mass. 349.) Where the actual transmission of the subject of the sale by the seller is impossible, various substitutes, complying as far as possible with the requirements of the statute, are allowed. (Long on Sales, 162; Abbott on Ship. 13; *Pratt v. Parkman*, 24 Pick. 47

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Story on Sales, § 311, etc.; 2 Kent's Com. 500; *Stanton v. Small*, 3 Sandf. 230; *Shandler v. Hereston*, 1 N. Y. 267; *Conard v. At. Ins. Co.*, 1 Pet. 445.) The doctrine asserted in behalf of the plaintiff's title is the doctrine of the common law, as modified by 13 of Elizabeth. It is recognized in the federal and the state courts, and the adjudicated cases in Pennsylvania establish nothing to the contrary. They also hold to the reasonable construction adopted in the cases before referred to. (*Clow v. Woods*, 5 S. & R. 275; *Cadbury v. Halen*, 5 Barr. 320; *Linton v. Butz*, 7 id. 89; *Haynes v. Hennisicker*, 2 Casey, 58; *Chase v. Ralston*, 6 id. 539; *Blair v. Rietz*, 3 P. F. Smith, 256; *Burford v. Schell*, 5 id. 393; *McKibben v. Wharton*, 14 id. 352, 358; *Hugus v. Robinson*, 12 Harris, 9; *Crawford v. Davis*, 99 Penn. St. 576-579; *Curtis v. D., L. & W. R. R. Co.*, 74 N. Y. 116; *Sherrill v. Hopkins*, 1 Cow. 103; *Dyke v. Erie. R. Co.*, 45 N. Y. 113.)

RAPALLO, J. This was an action for damages for the conversion of a canal boat. The defendant, as sheriff of Herkimer county, levied upon the boat as the property of George P. Fink, at Ilion, on the 25th of March, 1881, and afterwards sold the boat on execution, and this action was brought for such levy and sale. The defendant justified under an attachment issued against Fink as a non-resident debtor, at the suit of Kerr Bros. & Co., creditors residing in Pennsylvania, and under an execution issued in the same action. The regularity of the attachment and the proceedings thereunder as against Fink was admitted.

The plaintiffs claimed title to the boat by virtue of a written instrument, in form an absolute bill of sale, executed and delivered by Fink to the plaintiffs on the 24th of March, 1881, at Selins Grove in the state of Pennsylvania. The referee, before whom the trial was had, does not in terms pass upon the question whether this instrument operated as an absolute sale, or as a mortgage to secure the payment of certain sums in which Fink was indebted to the plaintiff; but the learned judge who delivered the opinion of the court at General Term,

after reviewing the findings and evidence, arrived at the conclusion that the transfer of the boat was taken by the plaintiffs merely as a security, and was in legal effect a mortgage. In this conclusion we concur.

Fink, the owner of the boat, the plaintiffs, and the attaching creditors, were all residents of Pennsylvania, and the indebtedness of Fink, both to the plaintiffs and to the attaching creditors, was incurred in that state. At the time of the delivery of the mortgage to the plaintiffs the boat was engaged in navigating the Erie canal and was at Ilion, Herkimer county, in this state, distant about two hundred and fifty miles from Selins Grove, Pennsylvania, where the mortgage was executed and delivered. The boat was then at Ilion in possession of Fink, through one Boyer, his driver, whom Fink had left in charge. On the 24th of March, 1881, the plaintiffs delivered the mortgage to one Spahr as their agent, with instructions to proceed at once to Ilion and take possession of the boat for them. He left by the earliest train and arrived at Ilion on the twenty-fifth of March at about half-past one o'clock P. M., but about an hour before his arrival there the defendant, as sheriff of Herkimer county, had levied upon the boat by virtue of the attachment before mentioned, against Fink. After this levy, and on the same day, Spahr filed a copy of the mortgage in the office of the town clerk of the town of German Flats, in which town Ilion is situated and the boat then was ice-bound. No other filing or recording of the instrument was shown. Spahr, after filing the copy, went on board of the boat and assumed possession and control thereof for the plaintiffs, subject to such constructive possession as the defendant had acquired by his said levy, and continued in such possession until the 9th of May, 1881, when the defendant sold the boat by virtue of proper proceedings in the attachment suit against Fink. This sale the referee finds to have been regular and valid in form in every respect, but not binding upon the plaintiffs for the reason, as he finds, that before such levy and sale the plaintiffs had become the owners by virtue of the before mentioned bill of sale.

The referee finds that the plaintiffs used all possible diligence to take possession of the boat after the execution of the bill of sale.

The referee directed judgment for the plaintiffs for the value of the boat, and the court at General Term affirmed the judgment, on the ground that the bill of sale, although it had been given merely as a security for debt and was to be treated as in legal effect a mortgage, was, according to the law of Pennsylvania, valid and effectual against creditors of the mortgagor, notwithstanding that possession had not been taken by the mortgagees before the levy, and the mortgage had not been filed as required by the statutes of this state, because the mortgagees had used due diligence to take possession and perfect their security.

The learned judge delivering the opinion expressly concedes that the judgment cannot be sustained except upon the theory that the bill of sale was a mortgage, and that under it the plaintiffs acquired a lien prior to the attachment. He then proceeds to state that the rights of the parties are not affected by the question whether the conveyance was a sale or a mortgage, because in Pennsylvania the presumption arising from the failure to immediately deliver, is the same under mortgages as under absolute sales, and he states that the case is greatly simplified by the mutual assumption of the parties that it is to be determined by the law of Pennsylvania, and he holds that it was competent for the parties to make that agreement.

The counsel for the appellant denies that there was any such assumption or concession. I have looked carefully through the papers, and have been unable to find on the record any such assumption or agreement as the learned judge seems to have supposed.

The case was submitted in this court on printed briefs, and it is stated in the appellant's brief that it was submitted in the same manner at the General Term. The case states that it was conceded on the trial that the statute (13 Eliz. C. 5) was in force in Pennsylvania, and that it was stipulated that upon the argument before the referee, and of any appeal, either

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party might cite reported decisions of the Supreme Court of Pennsylvania as if they had been put in evidence, but there was no stipulation that the law of Pennsylvania should govern the case. In the points submitted to us, the question whether the instrument under which the plaintiff's claim was an absolute sale or a chattel mortgage is discussed, and the point is expressly made that if it was a chattel mortgage it was to be governed by the laws of New York, and it is stated in the appellant's brief that the same point was submitted to the General Term. I can find nothing in the case which precludes the appellant from taking the point on the present appeal.

According to the laws of New York, the bill of sale, regarding it as a chattel mortgage, was void as against the defendant, both under the provisions of the Revised Statutes relating to chattel mortgages and under the act relating to liens on canal boats. The act of 1864 (Laws of 1864, chap. 412 §§ 1, 2), requires that every person having a lien by chattel mortgage on any boat navigating the canals of this State shall file the same, or a copy thereof, in the office of the auditor of the canal department, and that every mortgage or conveyance intended to operate as a mortgage on any such canal boat, not accompanied by an immediate delivery and followed by an actual and continued change of possession, shall be absolutely void as against creditors of the mortgagor unless so filed. By this act the want of an immediate delivery and change of possession does not, as in the case of absolute sales, merely raise a presumption of fraud, which can, as held in Pennsylvania, be rebutted by proof of good faith and due diligence in taking possession, but it makes the alleged lien absolutely void. This positive enactment of our own legislature cannot be made subject to the law of the domicile of the mortgagor. The general rule that the voluntary transfer of personal property where-soever situated, is to be governed by the law of the owner's domicile, always yields when the law and policy of the state where the property is actually located, have provided a different rule of transfer from that of the state where the owner lives. In *Warren v. Van Buskirk* (4 Abb. Ct. of App. Dec.

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457), it was held that a transfer of personal property situate in Illinois, made in New York where the owner resided, was valid as against attaching creditors who were also residents of this state but who had attached the property in Illinois, although the transfer was void according to the laws of Illinois. The judgment in that case was reversed by the Supreme Court of the United States, on the ground that the judicial proceedings under which the property had been attached and sold in Illinois were protected here by the provisions of the Constitution of the United States. (*Green v. Van Buskirk*, 3 Wall. 458; 5 id. 307; 7 id. 189.) In *Guillander v. Howell* (35 N. Y. 657) it was held that an assignment which was made in New York by a resident of this state, of personal property situate in New Jersey, which was valid under the laws of New York, but which was void under the laws of New Jersey, was ineffectual there as against a creditor of the assignee who had attached the property in New Jersey. In that case it appeared that the attaching creditor was a resident of New Jersey, and weight was given to that circumstance in the opinion, and it was supposed that the case of *Warren v. Van Buskirk*, which had been recently decided in this court, established that if the attaching creditors had been residents of New York, the transfer would have been valid as to them.

But the judgment of this court in *Warren v. Van Buskirk* had not, at that time, been reversed by the Supreme Court of the United States, and in the still later case of *Warner v. Jaffray* (96 N. Y. 248, 255) it was held that the residence of the attaching creditor was not material, and that where personal property situated in Pennsylvania and owned by a resident of New York was here transferred by an assignment valid in the State of New York, but invalid in Pennsylvania as against creditors, by reason of a failure to record it there as prescribed by a statute of Pennsylvania, it was void as against creditors who attached it in that state, notwithstanding that the attaching creditors were also residents of the state of New York. The doctrine was there reaffirmed that the liability of property to be attached and sold under legal process

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issuing from the courts of the state in which the property is actually situated, must be determined by the law of that state rather than that of the jurisdiction where the owner lives. These cases are decisive of the present appeal. It should further be remarked that although the transferrer or mortgagor of the canal boat in question, as well as the attaching creditors, were residents of Pennsylvania, yet the defendant in this action was the sheriff of a county in this state, and he should be protected in levying upon and selling property which, according to the laws of this state, was subject to the process in his hands. No principle of comity requires that he should be made liable for an act which the laws of this state required him to perform. The circumstance that he held a bond of indemnity does not render wrongful an act which was in itself lawful. The defendant was under no obligation to inquire into the residence of the parties to the action in which the process was issued.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

BLANK, Appellant, v. BLANK, Respondent.

Where a judgment by default was rendered, adjudging a marriage null and void, and a motion to open the default was denied, *held*, that defendant was not precluded by the judgment and order denying the motion from maintaining an action to set aside the judgment on the ground of fraud. In such an action the fraud alleged was that plaintiff was induced by false representations on the part of defendant, who was a lawyer, to the effect that the marriage was void under the laws of New York, to refrain from consulting counsel and defending the action to annul the marriage. The complaint in that action set forth facts sufficient to justify the court in annulling the marriage on the ground of fraud practiced by the defendant therein. Neither in the complaint in the action to set aside the judgment, nor by any proof or offer of evidence on the trial did the plaintiff attempt to controvert such facts, to deny that she was guilty of the fraud charged, or to show that she had any defense upon the facts in the

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former action. *Held*, that without regard to the question as to whether the marriage was lawful or unlawful as matter of law, or as to whether the representations of defendant in regard thereto were truthful or not, the complaint was properly dismissed, as it did not appear even if he was wrong in his statement of the case that plaintiff was thereby deprived of any defense in the former action.

(Argued May 5, 1887; decided October 11, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 28, 1884, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to set aside a judgment annulling a marriage contract between the parties and declaring void an ante-nuptial contract also made between them.

The action in which the judgment referred to was made was brought by the defendant herein upon the ground that the plaintiff had represented herself to be a widow, whereas she was divorced and her former husband was living; that he was influenced and deceived by these representations; that the divorce mentioned was procured by collusion and was, therefore, void, and that by the statutes of this state the plaintiff herein could not marry again during the lifetime of her former husband. The plaintiff in this action alleges that she was prevented from interposing any defense in the former action in consequence of the representations of the defendant, who was an attorney, on which she relied, that it would be utterly useless to make any opposition or to retain or consult counsel; that their marriage was a nullity from the beginning under the laws of this State; that the law forbade their cohabiting as husband and wife; that they could be arrested and made to suffer for it; that their marriage must be set aside; that it could not be prevented. The defendant denied the utterance of these representations or any of them, set up the decree of divorce already mentioned, the false representations of the plaintiff by which he was induced to make the ante-nuptial contract and enter into the marriage state. It appeared further from the pleadings

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that after plaintiff discovered that she had been deceived by the defendant, as alleged, she made application to open the default in the action mentioned brought against her by her husband, which application was denied. No appeal was taken from the order thus made.

Further facts appear in the opinion.

Samuel L. Gross for appellant. The order made at Special Term, Kings county, denying plaintiff's motion to open default is not a bar to this action. (*Keck v. Werder*, 86 N. Y. 264, 269; *Howell v. Mills*, 53 id. 322; *Foots v. Lathrop*, 41 id. 358, 359; *Hill v. Hermans*, 59 id. 396; *Riggs v. Pursell*, 74 id. 370; *Moore v. Shaw*, 77 id. 512; *Clark v. Dinchart*, 40 id. 342; *Simson v. Hart*, 14 Johns. 63; *In re Es's Tilden*, 98 N. Y. 434.) Defendant is wrong, in his supposition that the plaintiff does not take issue on the facts alleged in the complaint in the other action. Plaintiffs complaint should be liberally construed, and supported rather than destroyed. (*Allen v. Patterson*, 7 N. Y. 476; *Alcott v. Carroll*, 39 id. 436; *Lorillard v. Clyde*, 86 id. 384.) The allegations of the complaint in that action, if admitted to be true, entitled the plaintiff in that action, the defendant herein, to no relief. (*Clarke v. Clarke*, 11 Abb. Pr. 288; *Klein v. Wolfsohn*, 11 Abb. [N. C.] 135; *Kinnear v. Kinnear*, 45 N. Y. 535; *Ruger v. Heckel*, 21 Hun, 489; 85 N. Y. 483.) The plaintiff is entitled to have the ante-nuptial agreement properly acknowledged and restored to her on the facts as alleged in the complaint, which, of themselves, are sufficient to sustain this action. (*Evans v. Carrington*, 2 DeG., F. & J. 481; 30 L. J. Ch. 364; 7 Jurist [N. S.], 194.)

George Zabriskie for respondent. To obtain relief against a judgment, the party seeking relief must show that he was aggrieved by the judgment and has a valid defense on the merits, which defense must be disclosed. (*Hunt v. Wallis*, 6 Paige, 371; *Winship v. Jewett*, 1 Barb. Ch. 173; *Goodhue v. Churchman*, id. 596; *Powers v. Treanor*, 3 Hun, 3; *Ferrusac v. Thorn*, 1 Barb. 42.) And further, that he has

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been prevented from interposing such actual defense by the fraud of the actual party unmixed with negligence on his own part. (*Foster v. Wood*, 6 Johns. Ch. 87; *Duncan v. Eddy*, 3 id. 351; *Davone v. Fanning*, 4 id. 199; *U. S. v. Throckmorton*, 98 U. S. 61; *Smith v. Nelson*, 62 N. Y. 286.) The plaintiff's only claim for relief is untenable, it being that the Supreme Court, in rendering the judgment in the former action, erred on a point of law, and, while admitting all the facts found by that court by which the judgment was rendered, she seeks to obtain a review of that judgment on the same facts on which it was rendered, and asked the court which rendered the judgment, and now asks this court to reverse the judgment on the ground that the court erred in its law. (*Ross v. Wood*, 70 N. Y. 11; *Patch v. Ward*, L. R., 3 Ch. App. 203; *Greene v. Greene*, 2 Gray, 361; *Story's Eq. Jur.* § 1581; *Dobson v. Pearce*, 2 Kern. 156; *Mich. v. Phoenix B'k*, 33 N. Y. 9; *Simpson v. Hart*, 1 J. C. R. 91; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; *Davone v. Fanning*, 4 Johns. Ch. 199; *Brown v. Mayor, etc.*, 66 N. Y. 385; 65 Barb. 201; *People v. Stevens*, 51 How. Pr. 235; *Bouchand v. Dias*, 3 Denio, 238; *Code Civ. Pro.* § 724; *Cole v. Tyler*, 65 N. Y. 73.) The order made in the original cause upon plaintiff's motion for the same relief which she is now asking is a decision of the whole question in controversy here, and is a further bar to this action. (*Dwight v. St. John*, 25 N. Y. 203; *In re Livingston*, 34 id. 555, 577; *Riggs v. Pursell*, 70 id. 378.) Upon the plaintiff's own showing the judgment declaring the marriage void was right, and plaintiff has no defense which could be successfully interposed, if she were permitted now to come in and defend. (2 R. S. 139, § 5; *Smith v. Woodworth*, 44 Barb. 198; *Cropsey v. Ogden*, 11 N. Y. 228, 234; *Haviland v. Halstead*, 34 id. 643, 644; *Lemmon v. People*, 20 id. 562; *People v. Baker*, 76 id. 78, 88; *Paul v. Virginia*, 8 Wall. 169, 180; *Ex parte Kinney*, 3 Hughes, 9.) No cause of action was established as the representations stated in the complaint in this action amounted to nothing more than a mere expression of opinion on a matter

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of law. (*Upton v. Trebilcock*, 91 U. S. 50; *Huggins v. King*, 3 Barb. 616; *Ross v. Wood*, 70 N. Y. 10; *Patch v. Ward*, L. R., 3 Ch. App. 203; *Ward v. Southfield*, 102 N. Y. 287.)

RAPALLO, J. We think the judgment in this case was right, although we do not concur in the ground upon which it was rendered at Special Term. It was there held by the trial judge that the judgment of nullity of marriage rendered between these parties in the second department, on the 23d of September, 1876, not having been reversed on appeal, and a motion to open the default having been denied on the 21st of February, 1881, that judgment and the order denying the motion precluded the plaintiff from maintaining this action.

This action was brought to set aside the judgment of nullity on the ground that the present plaintiff had been induced by the defendant, by untrue statements as to the law of New York, to refrain from consulting counsel and from defending said action of nullity.

We concur in so much of the dissenting opinion of DANIELS, J., at General Term, in this case, as holds that, in this action to set aside the judgment of nullity on the ground that it was obtained by fraud, the judgment thus sought to be set aside could not be set up as a bar to the action to set it aside. This action did not seek to retry any question of fact which had been tried in the first action; and we also agree that the order of February 21, 1881, denying the motion to open the default of the present plaintiff and let her in to answer, was not a bar to her action to set aside the judgment as having been obtained by fraud. (*Riggs v. Pursell*, 74 N. Y. 370; *Foote v. Lathrop*, 41 id. 358.)

But we are of opinion that the judgment in this case should be sustained on the ground that the plaintiff did not in her complaint in this action, nor by any offer of proof on the trial, attempt to controvert any of the facts set up in the complaint in the action for nullity, nor to show that she had any defense to that action of which she was deprived. Her charge of fraud consists simply of an allegation, in substance, that the

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defendant, who is a lawyer, represented to her that her marriage with him was void by the law of New York, and that she had incurred liability to a criminal prosecution for entering into it, and that she was by these representations induced to refrain from defending the action. Without discussing the question of law involved it is sufficient, for the purpose of this appeal, to say that whether the marriage between the defendant and the plaintiff was legal or illegal, as matter of law, the fraud by which she was charged with having induced the defendant to enter into the contract, was sufficient to justify the court in setting it aside, and that she does not in any manner attempt to deny that she was guilty of the fraud charged, nor to show that she had any defense, upon the facts, to the action of nullity, of which the defendant deprived her, even if he was wrong in his statement of the law, a question which we do not now decide.

On this ground the judgment should be affirmed, with costs.
All concur.

Judgment affirmed.

JOHN P. HOLLINGSHEAD, Respondent, v. WILLIAM WOODWARD, Jr., Appellant.

Under the provision of the General Manufacturing Act (§ 24, Chap. 40 Laws of 1848), declaring "that no suit shall be brought against any stockholder" of a company organized under said act "who shall cease to be a stockholder * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," whenever a stockholder shall be divested of his interest in or control over the affairs of the corporation, by actual dissolution thereof by formal judgment, or by a surrender of its corporate rights, privileges and franchises, the time begins to run, and at the end of two years therefrom the stockholder is no longer liable for any debt of the corporation.

In an action seeking to charge defendant as a stockholder of such a corporation with a judgment against it, on the ground that the whole capital stock was not paid in, or a certificate of payment filed as required by the act, the answer set up among other things, in substance, that more than four years before the commencement of the action a judgment was ren-

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dered in an action against the corporation sequestrating its property, appointing a permanent receiver thereof and restraining its officers and agents from all interference with it; that said corporation has not since transacted any business; that the receiver took possession of the property and has distributed the proceeds among creditors pursuant to order of the court, the same not being sufficient to pay all of the company debts, and that defendant by reason thereof ceased to be a stockholder from the date of said judgment. On demurrer held, that the answer set up a good defense; that by the conceded facts it appeared that when the organization was divested of its rights, privileges, franchises and property by virtue of the appointment of a receiver, it for all practical purposes ceased to exist, and the defendant ceased to be a stockholder within the meaning of the act, and after the expiration of two years he was discharged from all liability.

Kincaid v. Dwinelle (59 N. Y. 548) distinguished and limited.

(Argued May 9, 1887; decided October 11, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made the first Monday of January, 1885, the nature of which and of the action, and the material facts are stated in the opinion.

Thomas G. Shearman for appellant. The statute which creates the personal liability of stockholders, also provides that no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any debts so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company. (Manufacturing Act, § 24; 3 Edmunds' Stat., 738.) The facts alleged in the third defense amounted in law to a dissolution of the corporation. (*Slee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 387; *Bk. Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Story v. Furman*, 2 N. Y. 214, 225, 230; *Bruce v. Platt*, 80 id. 379; *Bradt v. Benedict*, 17 id. 93; *Webster v. Turner*, 12 Hun. 264; *Sav'g Asso. v. Kellogg*, 52 Mo. 583; *Perry v. Turner*, 55 id. 418, 427; *Dryden v. Kellogg*, 2 Mo. App. 87; *Wiswell v. Starr*, 48 Me. 401; *Dane v. Young*, 61 id. 160; *Kincaid v. Dwinelle*, 59 N. Y. 548.)

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Thomas S. Moore for respondent. The Eagle Mowing & Reaping Machine Company has never been dissolved, and the defendant has never ceased to be a stockholder. (*Kincaid v. Dwinelle*, 59 N. Y. 548; *Bk. Com'rs v. Bk. of Buffalo*, 6 Paige, 497, 553.) Nothing but an act of the legislature repealing its charter; or a decree of a competent court, can dissolve a corporation so as to preclude suits and actions against it to enforce its debts and liabilities. (*L. O. Nat. Bk. v. Onondaga Co. Bk.*, 7 How. 549; *Prigle v. Woolworth*, 91 N. Y. 510; *Lee v. Am. A. P. Canal Co.*, 3 Abb. [U. S.] 11.)

DANFORTH, J. This action was brought by the plaintiff, as a creditor of the "Eagle Mowing and Reaping Machine Manufacturing Company," against the defendant as a stockholder therein, to the amount of 125 shares of its capital stock. The defendant, by way of answer, set up three defenses. The plaintiff demurred to the second and third defenses for the reason, as alleged, that "neither states facts sufficient to constitute a defense to the action." At Special Term the court held that each defense was sufficient, the second to so much of the complaint as it undertook to answer, and the third as to the entire cause of action; overruled the demurrer and dismissed the complaint upon the merits. Judgment was accordingly entered in favor of the defendant. Upon appeal to the General Term, the judgment, so far as it overrules the demurrer to the second defense, was affirmed; but so far as it overrules the demurrer to the third defense and awards final judgment to the defendant, it was reversed and judgment ordered in favor of the plaintiff upon the merits of the third defense, with leave to each party to amend his pleadings as he might be advised. One judge dissented, being of the opinion that as one of the defenses was sustained, the judgment of the Special Term should be affirmed *in toto*. The court were also of the opinion that the questions involved were of sufficient importance to make the decision of the Court of Appeals desirable, and so ordered. From so much of the judgment as sustained the demurrer to the third defenses

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the defendant appeals. The questions before us, therefore, require only an examination of the case as it stands upon the complaint and third defense.

The complaint states that the "Eagle Mowing and Reaping Machine Company" was a corporation organized in 1873, under the manufacturing laws of this State (Laws of 1848, chap. 40); that the whole capital stock has never been paid in, nor the certificate of payment filed as required by that act; that on the 30th day of October, 1878, it made its note for \$3,300, and on the 21st of August, 1878, became liable as indorser upon two other notes for \$2,500 and \$5,000, respectively, all of which were transferred to the plaintiff and came to maturity within three months after October, 1878; that he recovered judgment thereon against the company December 13, 1883, and on the 22d of December, 1883, the execution issued for its enforcement was returned unsatisfied; that on the 26th of December, 1878, one F. was duly appointed receiver of the property, things in action and effects of the said company, that he has duly qualified as such receiver, and that the business of the company has ever since been abandoned, and that it was, on said 26th day of December, 1878, insolvent and unable to pay its debts; that, at the time the notes aforesaid were made and indorsed, the defendant was a stockholder in the company, as above stated.

The third defense sets forth that on the 16th day of January, 1879, and more than four years prior to the commencement of this action, a judgment was rendered by the Supreme Court of this State, in an action wherein the Continental National Bank of the city of New York was plaintiff, and the Eagle Mowing and Reaping Machine Company was defendant, whereby it was duly adjudged "that all the stock, property and effects of the said Eagle Mowing and Reaping Machine Company, being the corporation referred to in the complaint, should be sequestrated for distribution among its creditors, and that one F., should be, and he was by the said judgment, appointed the permanent receiver of all the stock, property and effects of the said corporation, and vested with

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the exclusive control thereof; and the officers and agents of the said company were thereby restrained from all interference with such stock, property and effects; that the said receiver took possession of all the stock, property and effects of the said corporation, on the same day upon which judgment was entered, and since that date, and for more than four years prior to the commencement of this action, the said corporation has not transacted and could not transact any business, has not elected any trustees or other officers, and has not had any, and no transfers of its stock have been permitted or possible; that all the property and effects of the corporation have been distributed among its creditors by the said receiver, under direction of the said court, in pursuance of the judgment; and the same were not sufficient to satisfy the debts due from the said corporation to its creditors; and there is not, and never will be, any surplus for the stockholders thereof; that the defendant is advised and believes the said judgment of sequestration, and for the appointment of a receiver, as aforesaid, amounted in law to a dissolution of the said corporation; and that this defendant, by reason thereof, ceased to be a stockholder in the said corporation from the date of the said judgment, which was more than four years before the commencement of this action."

It is, therefore, assumed that at one time a liability existed on the part of the defendant and the question presented turns upon that part of section 24 of the Manufacturing Law (*supra*), which provides that "no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company." It follows from this enactment that whenever an existing stockholder shall be divested of his interest in or control over the affairs of a corporation, whether by voluntarily transferring his share to another person, or compulsorily as by forfeiture upon the declaration of the company (§ 8), time begins to run, and at the end of two years the statutory limit is reached and he is no longer liable for any debt

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of the corporation. The same result must follow upon the actual dissolution of the corporation by formal judgment, or by a surrender of its corporate rights, privileges and franchises. Organization then ceases and the artificial entity is resolved into its independent parts. The thing itself therefore no longer existing, there can be no shares in the thing and of course no stockholders. By the conceded facts in this case the company is brought within these conditions. On the 26th of December, 1878, it was insolvent and unable to pay its debts, its notes were refused payment, its ordinary and lawful business was not only suspended, but by the very language of the pleadings and so by concession of the parties, plaintiff as well as defendant, "its business has ever since been abandoned." All the circumstances are present which create a surrender, and this effect is produced without waiting for a judicial determination. For more than two years then before the commencement of this action the company had been divested of all rights, privileges or franchises which had been acquired under the laws of this State.

The proposition that the defendant, by force of such circumstances, ceased to be a stockholder within the meaning of the act, is also distinctly established by the authorities, and with such uniformity and for so long a time that further discussion, save by reference to them, is rendered unnecessary. They began with *Slee v. Bloom* (19 Johns. 456), were continued to *Bradt v. Benedict* (17 N. Y. 93), where, citing that and other cases, the doctrine was declared to be settled that if a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. The rule was reiterated and these cases approved in *Bruce v. Platt* (80 N. Y. 379). The case of *Slee v. Bloom* (*supra*), arose under the Manufacturing Act of 1811 (Laws of 1811, chap. 67), which declared (§ 7), that the persons composing the company at the time of its dissolution should be individually responsible for all debts then due and owing by it. The plaintiff was a creditor of the "Dutchess Cotton Manufacturing Corporation," and proceeded in April, 1819, under

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the section cited, to make the defendants liable for the debt. It appeared that there had been no judicial dissolution, but after December, 1817, there had been no meeting of the trustees, nor any business or act done by the corporation, and on the 1st of February, 1818, all the property of the corporation, real and personal, was sold by a sheriff under execution. It was held by the Chancellor (5 Johns. Ch. 366) that the corporation was not dissolved and the bill was denied, but on appeal the Court of Errors held otherwise, saying that by these circumstances the corporation became *ipso facto* dissolved within the meaning of the statute and that the defendants were liable. To the same effect are *Briggs v. Penniman* (8 Cow. 387), and *Bank of Poughkeepsie v. Ibbotson* (24 Wend. 473). In these cases the persons composing the company at the time of such dissolution were held liable, because the event on which their liability depended had in fact happened. In *Bruce v. Platt* (*supra*), and other cases, the same principle upon similar circumstances was applied to relieve a party otherwise liable, because by the practical dissolution of the company, its trustees were excused from making the report required by the act of 1848. It should be applied here.

The case before us is in its facts stronger for the appellant than those cited. The company had no property subject to levy and sale on execution, and that process was returned wholly unsatisfied. It next abandoned its business, and then by formal judgment of the Supreme Court "its stock, property and effects" were sequestered for distribution among its creditors through the medium of a receiver, and its officers and agents relieved from all interference therewith. The receiver then stood in place of the corporation, and by virtue of his appointment and the statutes which defined his powers and duties (2 R. S. tit. 4, page 3, chap. 8, art. 2, §§ 36, 37; *id.* art. 3, §§ 70-83) the corporation for all practical purposes ceased to exist.

The final decree under these statutes deprived the company of all its corporate property and powers, and vested both in the receiver. Moreover, if after payment of its debts there had remained a surplus, he would have restored it, not to the

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corporation, nor even to the shareholders according to the shares held by them, but "in proportion to the respective amounts paid in by them severally on their shares of stock." (§ 83, p. 471.) "It follows of course," said the Chancellor in *Bank Commissioners v. Bank of Buffalo* (6 Paige, 497) "that the final order or decree for the appointment of such a receiver, is a virtual dissolution of the corporation."

Moreover, this judgment has been enforced. The property of the company is exhausted, still leaving its creditors unpaid, and for more than four years the company neither has transacted business, nor been able to do so. The defendant is saved, therefore, upon the principle applied in *Slee v. Bloom*, and subsequent cases of that kind (*supra*), and also by the necessary effect of the judgment and the statute under which the receiver was appointed. He ceased to be a stockholder within the meaning of the act of 1848 (*supra*, § 24), and before this action was commenced the statutory prohibition contained therein attached, and he was no longer liable to be vexed by action.

The argument of the respondent rests on *Kincaid v. Dwinelle* (59 N. Y. 548). In that case a receiver was appointed, security given, and the fact reported to the court, but this was *ex parte* and the learned judge who delivered the opinion says: "No other proceeding was had in the action. Whether the injunction was ever served, or any notice of the receiver's appointment given to the corporation, does not appear," and he adds that the receivership, although differing somewhat in its extent and purpose from an ordinary receivership for the preservation of property *pendente lite* was, nevertheless, but a provisional remedy and necessarily temporary, subject to the further action and direction of the court and to any final judgment that might be given in the action. The case at bar goes much beyond the one cited. The remarks of the learned judge in argument must be restricted to the facts before him and the general statement as to the necessity of a judicial sentence of dissolution qualified by the reference to *Slee v. Bloom* (*supra*), and the distinction suggested between a temporary and final order, a provisional and a permanent

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receiver. Surely a person cannot justly be said to be a stockholder when the corporation itself has ceased to exist for all purposes for which it was created. Not only was the visible and tangible property of the corporation whose acts are before us absolutely and forever disposed of by adverse proceedings, but by the final judgment of the court it was deprived of all power to continue or resume business. This judgment was submitted to and there was neither intention or ability to go on.

The Special Term, therefore, properly held that it must be deemed to have surrendered its charter and to be dissolved in fact. The judgment of that court should, therefore, be affirmed, and the judgment of the General Term, so far as appealed from, reversed.

All concur, except PECKHAM, J., not sitting.

Judgment accordingly.

In the Matter of the Judicial Settlement of the Accounts of
BENJAMIN H. KENDRICK, as Administrator, etc.

EDWARD VISCHER et al., Executors, etc., Creditors, Respondents; EDWARD B. WESLEY, Creditor, Appellant.

It seems the provision of the Code of Civil Procedure (§ 403), declaring that "the term of eighteen months after the death of a person within this State, against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator," does not apply to the provision (§ 376), declaring that a judgment shall be conclusively presumed to be paid after twenty years from the time the party recovering it was entitled to a mandate to enforce it, except as against one, who, within the twenty years has made a payment or acknowledged an indebtedness thereon, and there is no provision contained in the Code which, under any circumstances, extends the time within which an acknowledgment or payment must be made in order to rebut the otherwise conclusive presumption of payment after the lapse of twenty years.

W. recovered a verdict against K. in May, 1863; K. died intestate in January, 1883; his administrator qualified in February, 1883; W. presented his claim in March, 1884. In February, 1884, a petition was presented by other judgment-creditors asking that the administrator of K. be

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required to pay their judgment. The administrator by his answer thereto, verified and filed in March, 1884, set up the judgment recovered by W.; that it was entitled to a priority; that notice of the claim thereon had been presented and that the assets were insufficient to pay it. *Held*, that conceding the eighteen months exclusion applied, this answer was not a sufficient acknowledgment to revive the W. judgment, as he was not a party to the proceeding in which the answer was interposed.

An admission or acknowledgment made to a stranger, not intended to be communicated to or to influence the conduct of a judgment-creditor, is not effectual to rebut the presumption of payment so arising or (*it seems*) to revive a debt barred by the statute of limitations.

A petition by the administrator for a judicial settlement of his accounts was verified November 20th and filed November 28th, 1884. Among the names set forth therein of those interested in the estate as creditors, etc., was that of W. The petition did not specify the amount or date of judgment or that any amount was due thereon. The administrator's account, which was verified at the same time with the petition, set forth said judgment and stated that the claim thereon was disputed by the administrator. *Held*, that the statement in the petition did not amount to a written acknowledgment of the debt.

On the hearing before the surrogate in January, 1885, an order was made on motion of the administrator allowing the account to be amended, by striking out the statement that the W. judgment was a disputed claim. Previous to this another judgment-creditor had filed objections to the claim on the W. judgment, on the ground that it was barred by the statute. *Held*, that it was out of the power of the administrator at that stage to bind the contesting creditors by any acknowledgment of the W. judgment as a subsisting claim.

Upon the settlement of an administrator's accounts creditors, whose claims are not barred by the statute of limitations, are entitled to object to those which are, when the assets are insufficient to pay both.

(Submitted June 7, 1887; decided October 11, 1887.)

APPEAL by Edward B. Wesley, a creditor, from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 22, 1887, which affirmed, so far as appealed from, a decree of the surrogate of the county of New York, on settlement of the accounts of Benjamin H. Kendrick as administrator of the estate of Edward E. Kendrick, deceased.

The proceedings were instituted upon the petition of said administrator. The contest was between judgment-creditors.

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Edward B. Wesley presented as a claim against the estate a judgment against the intestate recovered May 29, 1863. Edward Vischer and another, as executors of the estate of Catharine Vischer, deceased, presented as a claim a judgment therein as executors, rendered December 29, 1865; they also filed objections to the claim on the Wesley judgment on the ground that it was barred by the statute of limitations.

The further facts material to the questions discussed are stated in the opinion.

Samuel H. Randall for appellant. There was a sufficient acknowledgment of the Wesley claim, both in the petition for citation and the "account of proceedings," made on November 20, 1884, within the time of limitation, to prevent the bar of the statute against appellant's claim. (Code of Civil Pro. §§ 376, 403; *Boyer v. Wilcox*, 3 Cow. 150; *Ross v. Ross*, 6 Hun, 80; *Morrow v. Morrow*, 12 id. 386; *Adams v. Orange Bk.*, 17 Wend. 514; *Brett v. Hunt*, 6 Johns. 16; *McNamee v. Feuery*, 41 Barb. 495; *De Forest v. Warner*, 30 Hun, 94; *Fiske v. Hubbard*, 13 J. & S. 331; *Murray v. Coster*, 20 Johns. 576.) The plea of the statute of limitations was either a personal privilege, which the administrator could alone avail of, or the respondents were not entitled as creditors to plead this statute, when it would be inequitable for the administrator to do so. (Redf. L. & Pr. § 2533 [Surrogate's Ct.], art. 9, pp. 387-392.) The statute was not properly and sufficiently pleaded by the respondents, or in such manner that they were entitled to derive any benefit therefrom. (*Budd v. Walker*, 3 N. Y. Civ. Pro. 422; *B. Bank v. Luff*, 51 How. Pr. 479.) The surrogate had ample power to allow the amendment of the original account of proceedings by limiting the dispute of the claims therein to the Visscher claim, and to treat the account as containing an acknowledgment of the indebtedness of appellant's claim. (Code Civ. Pro. § 2472, subds. 3, 6; § 2481, subds. 6, 11.) The acknowledgment of appellant's claim by the administrator in his answer on respondents' application on March 28, 1884, was such an acknowledgment as to

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prevent the operation of the statute, and the surrogate's action was in the nature of a *res adjudicata* as to the priority of appellant's claim. (*Morrow v. Morrow*, 12 Hun, 386.)

Henry G. Atwater for respondents. Any creditor of the estate was entitled to attack the Wesley judgment as barred by the statute of limitations. (*Shewen v. Vanderhorst*, 1 R. & M. 352; *Ex parte Dewdney*, 15 Ves. 498; *Partridge v. Mitchell*, 3 Edw. Ch. 180; *Moodie v. Bannister*, 4 Drewry, 438; *Fisher v. Mayor, etc.*, 6 Hun, 64.) Proof that in a proceeding in the Surrogate's Court, between the administrator and another creditor, the administrator, in an answer to a petition against him for the payment of another debt, had acknowledged and set up the Wesley judgment was not an acknowledgment such as the statute intends, because not made to Wesley or any one acting for him, nor with intent to influence or control his conduct. (*Wakeman v. Sherman*, 9 N. Y. 85; *Winterton v. Winterton*, 7 Hun, 230; *Fletcher v. Updike*, 67 Barb. 364; *Bloodgood v. Bruen*, 8 N. Y. 362; *De Freest v. Warner*, 98 id. 217; *Sands v. Gelston*, 15 Johns. 511; *Clark v. Dutcher*, 9 Cow. 675; *Shapley v. Abbott*, 42 N. Y. 443; *Com. Mut. Ins. Co. v. Brett*, 44 Barb. 489.)

RAPALLO, J. The appellant, Edward B. Wesley, claimed before the surrogate on the final settlement of the accounts of the administrator, to be a judgment creditor of the intestate, and, as such, entitled to payment in preference to other creditors. The surrogate decided that the judgment under which the appellant claims, having been recovered more than twenty years before, must, under the statute, be conclusively presumed to have been paid, and on that ground rejected the claim.

The judgment was recovered by Wesley against Edward E. Kendrick, the intestate, on the 29th of May, 1863. Kendrick died January 9, 1883. His administrator qualified February 9, 1883, and Wesley presented his claim March 27, 1884. More than twenty years had then elapsed after the recovery of the judgment, and the statutory presumption of payment had

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then attached. It is not claimed that any payment had been made, or acknowledgment of a continuing indebtedness given, before such presentation, and the claim being then barred by the statute, no acknowledgment or new promise made by the administrator after it had become thus barred, would, if made, have been available to revive the debt against the other creditors or the next of kin of the intestate. (*McLaren v. McMartin*, 36 N. Y. 88.)

The learned surrogate of New York treats the case as if section 403 of the Code were applicable, which provides that "the term of eighteen months after the death, within the State, of a person against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator," and by the application of that section he assumes that the presumption of payment did not attach until November 30, 1884, which would have been twenty-one years and six months after the recovery of the judgment, and that an acknowledgment, if made by the administrator in proper form within the twenty-one years and six months, would have been sufficient. We do not agree to the correctness of that view. The statute (Code, § 376) declares that a judgment shall be presumed to be paid and satisfied after the expiration of *twenty years* from the time when the party recovering it was first entitled to a mandate to enforce it, and that this presumption is *conclusive*, except as against a person who, *within twenty years from that time*, makes a payment or acknowledges an indebtedness of some part of the amount recovered. The extension of eighteen months mentioned in section 403 applies only to those sections following 380, which limit the time for commencing certain actions, and are added to the times limited in those sections for bringing the action, but there is no provision contained in the Code, which, under any circumstances, extends the time within which an acknowledgment or payment must be made, in order to have the effect of rebutting the otherwise conclusive presumption, after the lapse of twenty years, that a judgment has been paid and satisfied.

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All the acts which the appellant claims to have constituted acknowledgments of indebtedness sufficient to rebut the presumption of payment of his judgment, were performed on or after the the 27th of March, 1884, which was twenty years and nearly ten months after the entry of the judgment, and they were for that reason ineffectual to revive the judgment. But assuming that the extension of eighteen months was applicable, and that therefore the presumption of payment did not arise until the 30th of November, 1884, we think that no sufficient acknowledgment was shown.

On the 27th of February, 1884, the executors of Catherine Visscher, who are respondents on this appeal, presented to the surrogate a petition that the administrator of Kendrick be decreed to pay a judgment recovered by the testator of the petitioners against Kendrick, the intestate, on the 29th of December, 1865. The administrator in his answer to that petition verified March 27, 1884, and filed March 28, 1884, set up among other things, the judgment which had been recovered by Wesley the appellant on the 29th of May, 1863; that it was entitled to priority over the Visscher judgment; that notice of the claim on the Wesley judgment had been duly served on the administrator, and that the assets in his hands were less than the amount of said Wesley judgment.

This answer is claimed by the appellant to constitute an acknowledgment in writing that the Wesley judgment was a subsisting claim against the estate. But we are of opinion that the answer to the Visscher petition was insufficient to revive the Wesley judgment, and that the appellant cannot avail himself of it for the reason, in addition to the one already stated, that the appellant was not a party to the proceeding in which the answer was interposed; that the acknowledgment claimed to be contained in the answer was not made to the appellant, nor to his agent, nor to any one acting in his behalf, nor was it intended to be communicated to him or to influence his conduct. An admission or acknowledgment made under such circumstances, to a stranger, is not effectual to rebut the presumption of payment or to revive a debt

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barred by the statute of limitations. (*Bloodgood v. Bruen*, 8 N. Y. 362; *Wakeman v. Sherman*, 9 N. Y. 85; *De Freest v. Warner*, 98 N. Y. 217.)

It is further claimed that in the proceedings for a final accounting now under review the administrator acknowledged the liability of the estate on the appellant's judgment.

The petition for the judicial settlement of the administrator's accounts was verified November 20, 1884, and filed November 28, 1884. It set forth, as required by section 2729 of the Code, the names of the persons interested in the estate of the deceased, as creditors, legatees, next of kin or otherwise, and, therefore, required by law to be cited, to the best of the knowledge, information and belief of the petitioner, and among the persons so named was "Edward B. Wesley a judgment creditor of the deceased," and it prayed for a citation, etc. A citation was thereupon issued to the persons named, returnable December 12, 1884. The petition did not specify the amount of the judgment, the date of its recovery, or that any amount was due thereon. Section 2729 required that persons claiming to be creditors be named in the petition, and the mere naming of Wesley as a creditor to be cited, without any other statement did not amount to a written acknowledgment of the debt, especially as the administrator's account, which was verified at the same time with the petition, set forth the Wesley judgment and stated that the claim of the appellant thereon was disputed by the administrator.

This account, setting forth the Wesley judgment as a disputed claim, was filed on the 15th of December, 1884, after the expiration of the extension of eighteen months allowed by section 403, assuming that such extension was to be allowed. On the hearing before the surrogate in January, 1885, an order was made on motion of the administrator, allowing the account to be amended by striking out the statement that the Wesley judgment was a disputed claim, but it was too late at that time to bind the estate by any acknowledgment of the administrator. The account as rendered had been filed with the surrogate on the 15th of December, 1884, and the executors of Visscher,

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another judgment creditor whose claim was not barred by lapse of time, had filed objections to the claim on the Wesley judgment, alleging that it had been recovered more than twenty years previously, excluding eighteen months after the death of the intestate, and that it was barred by the statute. It was out of the power of the administrator at that stage to bind the contesting creditors by an acknowledgment of the Wesley judgment as a subsisting claim, and we entertain no doubt of the right of creditors whose claims are not barred, to object to those which are, where the assets are insufficient to pay both.

There are no facts to support the claim on the Wesley judgment other than those which have been referred to. Of course, the oral communications between the attorneys for the respective parties cannot be taken into consideration. (Code, § 395.)

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

BETTY SCHOENER et al., Appellants, v. MAX J. LISSAUER et al.,
Respondents.

107	111
134	578

107	111
142	6

107	111
158	240

The provision of the Code of Civil Procedure (§ 882, sub. 5), applying a six years limitation to actions "to procure a judgment other than for a sum of money on the ground of fraud, in a case," formerly "cognizable by the Court of Chancery," does not apply to an action by the owner of the fee to remove a cloud upon title to land, by the cancellation of a mortgage thereon, to which the owner has a good defense.

The right to bring such an action is never barred by the statute of limitations.

In an action brought to procure the cancellation and discharge of a mortgage, on the ground that it had been procured by duress, the trial court found that the execution of the mortgage was procured by defendants by threats and menaces, to the effect that unless the mortgagor gave it they would cause her son to be sent to State prison for larceny and embezzlement, for which he was under arrest and indictment on their complaint, they stating if their terms were complied with they would release the prisoner. if in their power, but if not complied with he would be sent to

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State prison; that she executed the mortgage while under fear, terror, coercion and duress created by the threats, and that the prisoner was immediately thereafter discharged on his own recognizance. *Held*, that the findings were sufficient to sustain a judgment for the relief sought. *Solinger v. Earle* (82 N. Y. 393) and *Haynes v. Rudd* (102 N. Y. 372) held not to be in conflict.

(Argued June 10, 1887; decided October 11, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department made April 2, 1885, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial. (Reported below 36 Hun, 100.)

The nature of the action and the material facts are stated in the opinion.

Louis Marshall for appellants. Where one induces another to enter into a contract and part with his property, either by duress or imprisonment, or *duress per minas* the transaction is voidable. (*Foshay v. Ferguson*, 5 Hill, 154; *Osborne v. Robbins*, 36 N. Y. 365; *Williams v. Bayley*, L. R. 1 H. L. C. 200; *Bush v. Brown*, 49 Ind. 573, 578; *Richards v. Vanderpoel*, 1 Daly, 171.) It is not necessary that the duress should have been exerted upon the person from whom the security is obtained, or that the threats should have been uttered against such person. It is sufficient if the relation existing between the person threatened and the person parting with property or security is so intimate and tender as to lead to the inference that by means of such threats the will of the person parting with the property was overcome. (*Eadie v. Slimmon*, 26 N. Y. 10; *Harris v. Carmody*, 131 Mass. 51; 20 Am. L. R. [N. S.] 663, 666, *note*; 26 Alb. Law Jour. 224; *Coffman v. Lookout Bk.*, 5 Lea, 232; *Haynes v. Rudd*, 30 Hun, 237; 83 N. Y. 253; *Foley v. Green*, 14 R. I. 618; *Bayley v. Williams*, 4 Giff. 638; *Williams v. Bayley*, L. R. 1 H. L. C. 200; *Davis v. L. & Pro. Ins. Co.*, L. R. 8 Ch. Div. 469; *Whitmore v. Farley*, 14 Cox Crim. Cas. 617; *Taylor v. Jaques & Co.*, 106 Mass. 291; *Richards v. Vanderpoel*, 1 Daly, 61;

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Porter v. Jones, 6 Cald. 313; *Hackett v. King*, 6 Allen, 58; *Peed v. McKee*, 42 Ia. 689.) The power of a court of equity to interfere in a case like the present for the purpose of decreeing a cancellation of the instrument is undoubted. (Story's Eq. Jur. § 695a; Willard's Eq. Jur. [Potter's ed.] 298, 300, 303, 304.) The trial court committed no error in finding that: "Although the transaction between the parties may have included the compounding of a felony, the mortgage in question being procured by duress exercised upon the mortgagor, this action is nevertheless maintainable, because the parties cannot be said to be *in pari delicto*. (1 Story's Eq. Jur. § 300; *Knowlton v. S. & E. Spr. Co.*, 14 Blatch. [103 U. S.] 49; *Collins v. Blanton*, 2 Wil. 347; *Smith v. Bromley*, 2 Douglas, 695, note, 697; *Williams v. Headley*, 8 East 378; *Tracy v. Tallmadge*, 14 N. Y. 162; *Curtiss v. Leavitt*, 15 id. 16; *Osborne v. Williams*, 18 Ves. 378; 32 Beavan, 574; *Woodhouse v. Meredith*, 1 J. & W. 224; *Chesterfield v. Janssen*, 2 Ves. 186; *Norris v. McCulloch*, 2 Ed. 190; *Foley v. Greene*, 14 R. I. 618; 1 Story's Eq. Jur. §§ 298, 300; *Bayley v. Williams*, 4 Giff. 638; *Williams v. Bayley*, L. R. 1 H. L. C. 200; *Davies v. L. & P. M. Ins. Co.*, L. R. 8 Ch. Div. 469; *Whitmore v. Farley*, 14 Cox Cr. C. 617, 622.) In a legal sense an action to set aside a mortgage on the grounds of duress is no more an action brought upon the ground of fraud, than is an action for false imprisonment, assault and battery and trespass, and hence it was not barred by section 382 of the Code. (Bishop on Cont., §§ 643, 715, 726; *Pierce v. Brown*, 7 Wall. 205.) When a right of recovery exists upon two separate grounds, the loss of one by lapse of time does not impair the other. (Angell on Limitations, 375; *Graham v. Luddington*, 19 Hun, 250.) The cause of action, being the claim made by the defendants, of ownership of the mortgage and their threats or attempt to enforce it as a security, so long as the cloud continues upon the plaintiff's title, and the mortgage remains a lien upon it capable of enforcement, and it prevents the plaintiffs from conveying an unincumbered title, the right of action to remove it exists. (*Miner v. Beek-*

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man, 50 N. Y. 387; *People ex rel. Townshend v. Cady*, 50 Supr. Ct. R. 399; 99 N. Y. 620; 51 Supr. Ct. R. 316; 4 Kent's Com. [11th ed.] 213, *n.*) In any event the action is one the limitation of which is not specially prescribed, within the meaning of section 388 of the Code of Civil Procedure, and therefore it is not barred until ten years after the cause of action has accrued. (*Peters v. Delaplaine*, 49 N. Y. 62; *Hubbell v. Medbury*, 53 id. 98; *Miner v. Beekman*, 50 id. 337; *Hubbell v. Sibley*, id. 458; *Scott v. Stebbins*, 91 id. 605; *Brinkerhoff v. Bostwick*, 99 id. 185; *Fisher v. Mayor, etc.*, 67 id. 73, 78; *Oakes v. Howell*, 27 How. 145; *Graham v. Luddington*, 19 Hun, 246; *Hoyt v. Putnam*, 39 id. 405; *In re Striker*, 23 id. 647; 85 N. Y. 629.) The plaintiffs have been guilty of no such laches as will debar them from maintaining this action, it not appearing that the defendants have in the least been injured by the delay, and there being neither a finding nor request to find to that effect. (*Platt v. Platt*, 58 N. Y. 646; *McMurray v. McMurray*, 66 id. 175; *Boardman v. L. S. & M. S. R. R. Co.*, 84 id. 182-184; *Smith v. Knapp*, 30 Hun, 309.)

Julius Lipman for respondents. This action was barred by the statute of limitations not having been brought within six years after discovery of the facts upon which it is based. (Code Civ. Pro., § 382, subd. 5; *Eadie v. Slimmon*, 26 N. Y. 12; *Farmer v. Walter*, 2 Edw. Ch. 603.) "Duress," or a violation of a prohibition of a statute which render a contract void are "frauds." Story classifies "duress" under the head of actual fraud. (Story's Eq. Jur., 239; William's Eq., 208.) The representations and threats made did not, in a legal sense, constitute duress. (*Met. L. Ins. Co. v. Meeker*, 85 N. J. 614.)

RAPALLO, J. The order of reversal in this case does not state that the judgment rendered at Special Term was reversed upon any question of fact. Error of law must, therefore, be shown to sustain the order of reversal

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The court at General Term, while conceding that the facts found were in other respects sufficient to authorize the judgment, place their reversal wholly upon the ground that the action was barred by the statute of limitations. This is the only error of law assigned, and none other is disclosed by the case.

The action was brought by the heirs-at-law of Mrs. Babet Marx, deceased, to procure the cancellation and discharge of a mortgage on her real estate, executed by her in May, 1873, and duly recorded and held by the defendants. She died on the 22d of September, 1879. No attempt had been made in her lifetime to enforce the mortgage, and, on her decease, it remained on record, an apparent lien upon her real estate, which had descended to the plaintiffs as her heirs-at-law. This action was commenced on the 29th of September, 1879, to restrain the enforcement of said mortgage and procure it to be canceled of record, on the ground that its execution had been procured by duress.

The trial court found that the execution of the mortgage by the said Babet Marx had been procured by the defendants by their threats and menaces, that unless she gave said mortgage they would cause her son to be sent to the State prison for the offense of larceny and embezzlement, which they charged him with having committed against them when in their employ, and for which he was under arrest and indictment on their complaint, and about to be tried; that they stated to the sister and uncle of the prisoner that he could regain his freedom in no other way than by the payment of \$2,000, and that if that sum was not paid he would certainly have to go to State prison; that, after negotiation, the defendants communicated to the mother of the prisoner, through his sister, a statement that he would be sent to State prison unless the mother would pay \$1,000 in cash and give a mortgage for \$1,999 on the premises in question, the defendants agreeing not to harass her for the said mortgage during her lifetime; that if these terms were complied with they would release the prisoner if in their power, if not he would be sent to State prison; that said Babet Marx, the mother, after a long struggle, consented

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to these terms, and executed the mortgage and paid the \$1,000 in cash while under the influence of fear, terror, coercion and duress, created by the threats of the defendants, and believing that they would be carried into execution, and the prisoner was immediately thereafter discharged on his own recognizance.

On these facts the court at Special Term rendered judgment directing the cancellation of the mortgage and requiring the defendants to discharge it of record. Upon the merits, this judgment is sustained by *Bayley v. Williams* (4 Giff. 638; affirmed, L. R., 1 H. L. Cases, 200); *Davies v. London, etc., Insurance Company* (L. R., 8 Ch. Div. 469), and is not in conflict with *Solinger v. Earle* (82 N. Y. 393), or *Haynes v. Rudd* (102 N. Y. 372). The case made by the complaint and findings was a proper one for the removal of a cloud upon the title of the plaintiffs to the real estate which they had inherited from their mother. The mortgage was certainly an apparent lien upon their title, and the facts which constituted their defense to it could only be established by extrinsic evidence. The court, at General Term, reversed the judgment on the sole ground that the action was barred under section 382 of the Code, subdivision 5, which applies a six years limitation to actions "to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the 31st day of December, 1846, was cognizable by the Court of Chancery," in which class of cases the cause of action is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

We are of opinion that this limitation does not apply to an action, like the present one, to remove a cloud upon the title to land. The action is not brought to recover the land, that being already in the possession of the plaintiffs, but to compel the cancellation of an instrument to which they have a good defense, but which constitutes an apparent lien, and, so long as it remains outstanding, injuriously affects their title, and their defense to which, resting on extrinsic facts to be estab-

lished by evidence, may be imperiled by the lapse of time and the consequent loss of testimony. Should the defendants ever seek to enforce their mortgage the plaintiffs could not, by any lapse of time be barred of the right to prove the facts which constitute their defense to it, although they might be seriously embarrassed in the practical exercise of that right. It is an acknowledged head of equity jurisdiction, resting on these grounds, to remove clouds upon the title to land, at the suit of the owner of the fee. Such owner has a right to invoke this aid and to have an apparent, though not real incumbrance, discharged of record at any time while he continues to be owner. This right, as said in some of the authorities, is never barred by the statute of limitations so long as the cloud continues to exist. (*Miner v. Beekman*, 50 N. Y. 337, 343.) The cause of action is not the creation of the cloud, but its existence, its effect upon the title of the owner, and his right to have it removed. That is a continuing right which endures as long as the occasion for its exercise, and is not limited by any statute, unless it be the ten years limitation upon equitable actions not otherwise provided for (Code, § 388), which, even if applicable, does not affect the right of the plaintiffs in this case. But a few months more than six years had elapsed after the execution of the mortgage when this action was commenced. It was not until the death of Mrs. Marx, in September, 1879, that the right of the plaintiffs, as her heirs-at-law, to demand that their land be discharged of the apparent lien of the mortgage, accrued. After that event and immediately before the commencement of this action the plaintiffs demanded of the defendants the execution of a satisfaction-piece of the mortgage, and they refused to execute the same. The plaintiffs thereupon promptly brought this action and we think that they were entitled to the relief demanded.

The order of the General Term should be reversed, and the judgment entered at Special Term affirmed, with costs.

All concur.

Order reversed and judgment affirmed.

Statement of case.

MARIANNA CLARK, Respondent, v. ALFRED MOSHER, as
Administrator, etc., Appellant.

Where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant and the original defendant has been discharged, on payment into court of the amount of the demand, in pursuance of the provision of the Code of Civil Procedure (§ 820), the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a trial by jury.

Where, therefore, in such an action the trial judge empanelled a jury and submitted to them a single question of fact, but disregarded their finding and found the fact the contrary. *Held*, that a judgment entered pursuant to the findings and conclusions of the court was regular.

(Argued June 21, 1887; decided October 11, 1887.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department made November 16, 1886, which reversed an order of Special Term denying a motion on the part of the plaintiff to set aside a judgment herein and the findings and conclusions of law of the trial court on which the judgment was rendered, and which set aside said judgment, findings and conclusions.

Plaintiff brought this action originally against the Phoenix Mutual Life Insurance Company upon a policy of life insurance issued by that company. The defendant, upon an affidavit showing that one Mosher claimed to own the policy and to be entitled to the amount due thereon, moved in pursuance of section 820 of the Code of Civil Procedure that said Mosher be substituted as defendant, and that it be discharged on payment of the money into court. The motion was granted and Mosher died pending the litigation and his administrator, the present defendant, was substituted.

The cause was placed on the circuit calendar for trial. When it was called defendant's counsel stated it was an equity case. The court directed a jury to be impanelled, and on the conclusion of the evidence, submitted to the jury one question of fact which they decided in plaintiff's favor. Defendant's counsel moved that the verdict be set aside; the court granted

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the motion and found the fact contrary to such verdict, and upon this, with other findings and conclusions of law, directed judgment for defendant. Judgment was entered accordingly.

Plaintiff thereupon moved to set aside the judgment and findings on the ground that the action was one of law triable by a jury.

Nathaniel C. Moak for appellant. Defendant's motion to set aside the verdict and that the court find the facts in his favor was proper, if the case was then to be treated as a trial in equity. (*Carroll v. Dimel*, 95 N. Y. 255; Code of Civ. Pro., §§ 823, 971, 1003; 2 Abb. Pr. [N.S.] 385, 406; *Vermilyea v. Palmer*, 52 N. Y. 471; *Colie v. Tift*, 47 id. 119; *Birdsall v. Patterson*, 51 id. 43-50.) Not having objected or excepted plaintiff cannot insist no findings ought to have been made. (*Graham v. O'Hern*, 24 Hun, 221, 222, 223; *Provost v. McEncroe*, 102 N. Y. 650.) The case was in fact an equity cause or one not triable by a jury as a matter of right. (1 Abb. Forms, 567; *Watson v. Man. Ry.*, 17 Abb. [N. C.] 797; Code, §§ 419, 420, 1212; Van Santvoord's Plead. [Moak's ed.] 358, 359; *Wilson v. Lawrence*, 8 Hun, 593, 595; *Cronin v. Cronin*, 9 Civ. Pro. R. 137; *Crawshaw v. Thornton*, 2 Myl. & Cr. 1, 21; 3 Reeve's Eng. L. 250, 448; *Langston v. Boylston*, 2 Ves. Jr. 109; *Angell v. Hadden*, 15 id. 245; *Glyn v. Duesbury*, 11 Sim. 147; *Cady v. Potter*, 55 Barb. 463; *Barry v. Mut. L. Ins. Co.*, 53 N. Y. 536; *Perkins v. Trippel*, 40 Ga. 225; *Bleeker v. Graham*, 2 Edw. Ch. 647; *Farley v. Blood*, 30 N. H. 363; *Richards v. Salter*, 6 Johns. Ch. 445.) A verdict on a specific question, without a general verdict, in an action of law, is clearly unauthorized and illegal. (Code, §§ 1185, 1186; *Walsh v. Bowery, etc.*, 10 Civ. Pro. R. 32; *Wilcox v. Hoch*, 62 Barb. 509, 511, 512; *Parker v. Laney*, 58 N. Y. 469.) Even if the case were not an equity suit it was tried on the theory that it was, by assent of both parties, and having been so tried, neither party could insist it was not so, when by so doing the other might be prejudiced by such change of theory. (Code, § 1009; *Bliss v. Bliss*, 11 Civ. Pro. Rep.

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98; *Carroll v. Deimel*, 95 N. Y. 255; *Lewis v. Mott*, 36 id. 395; *Barlow v. Scott*, 24 id. 40; *Kenny v. Appgar*, 93 id. 539; *Baird v. Mayor, etc.*, 74 id. 386; *Greason v. Keteltas*, 17 id. 491, 498; *West Point Iron Co. v. Reymert*, 45 id. 703, 705; *McKeon v. See*, 51 id. 300; *Black v. White*, 5 J. & S. 320; *Murtha v. Curley*, 90 id. 372.)

E. Countryman for respondent. A verdict cannot be set aside in a case where there is a direct conflict in the evidence involving the credibility of witnesses, merely because the judge or court would have reached a different conclusion. (*Baird v. Mayor, etc.*, 96 N. Y. 567; *Hellburn v. Robinson*, 2 State Rep. 618; *Bagley v. Rome*, 6 id. 842.) An issue of fact where the complaint demands judgment for a sum of money only must be tried by a jury unless such trial is waived or a reference directed. (Code Civ. Pro., § 968; *Hun v. Cary*, 82 N. Y. 66, 79.) The formal prayer of the complaint "for such other and further relief in the premises as the court may grant does not change the nature of the action." (*Hale v. Omaha Bk.*, 49 N. Y. 626, 631; Van Santvoord's Plead. [Moak's ed.] 353, 407; *Hudson v. Caryl*, 44 N. Y. 553; *Litchfield v. Dezendorf*, 11 Hun, 358; *Reuben v. Joel*, 13 N. Y. 493-498; *Parsons v. Redford*, 3 Peters, 433; Code of Civ. Pro., §§ 970, 972; *Steinberger v. McGovern*, 56 N. Y. 12, 20, 21; *Wheelock v. Lee*, 74 id. 496; *People v. A. & S. R. R. Co.*, 57 id. 162.) This action could not have been maintained as a suit of interpleader in equity by the plaintiff, prior to the old or new Code. (*Killian v. Ebbinghaus*, 110 U. S. 568, 573; *Kipp v. Babin*, 19 How. [U. S.] 277, 278; *Atkinson v. Monks*, 1 Cow. 692; *Bedell v. Hoffman*, 2 Paige, 199; *Grand Chute v. Winegar*, 15 Wall. 375; *Lewis v. Cocks*, 23 id. 470.) The question of fact here was one for the jury. (*Frank v. Mut. L. Ins. Co.*, 102 N. Y. 267, 277, 279; *Stevens v. Mayor, etc.*, 84 N. Y. 297; *Hammond v. Morgan*, 101 id. 180; *Page v. Cameron*, 11 Week. Dig. 478.) Plaintiff has not waived her constitutional right, the only issue of fact in the case having been actually submitted to the jury and she having since per-

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sistently protested against every effort and proceeding to interfere with the verdict. A party cannot be deprived of such a right by such a technicality. (*People v. A. & S. R. R. Co.*, 57 N. Y. 162; *Wheelock v. Lee*, 74 id. 496.) Neither party is now permitted to take advantage of any informality in the manner of submitting the case to the jury, or any informality of the verdict, no objection having been taken at the trial. (*Carr v. Carr*, 52 N. Y. 251; *Jones v. Brooklyn Ins. Co.*, 61 id. 79.)

RAPALLO, J. If the counsel for the defendant was right in the position which he took at the Circuit, that this was an equity case triable by the court, the practice adopted by the trial judge in empanelling a jury and submitting to it a single question of fact, to be answered in the affirmative or negative, was correct. The judge was also right in holding that he had the power to disregard the finding of the jury on the question thus submitted, and to find the fact the contrary way; and the judgment for the defendant entered pursuant to his findings and conclusions was regular. (*Carroll v. Deimel*, 95 N. Y. 255.)

The court at General Term held, on the motion to set aside that judgment, that the action was one at law, for the recovery of money only, in which the plaintiff was entitled to a trial by jury; that the judge consequently had no power to disregard the verdict and substitute his own findings, and that the judgment entered thereon was irregular.

We are of opinion that the trial judge was right in holding, as claimed by the defendant, that the action was of an equitable nature and triable by the court. The plaintiff had no right of action at law against the defendant, and did not seek to recover any money from him. The money in controversy was in court, having been paid into court by a third party, the Phoenix Mutual Life Insurance Company, under an order made on the application of that company pursuant to section 820 of the Code. The plaintiff had brought an action at law against the company upon a policy of insurance and the company,

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admitting its liabilities on the policy, set up that the defendant's intestate also claimed the amount of the policy, and by this proceeding in the nature of a bill of interpleader, on payment of the fund into court, the plaintiff was required to substitute the defendant's intestate as defendant, and the object of this action was to determine the conflicting claims of the plaintiff and the defendant to the fund in court. Neither party had any right of action at law against the other, but by this equitable proceeding, authorized by the Code, the Insurance Company, against whom both claimed a legal cause of action, was discharged, and they were brought together to litigate the question which of them had the better right to the fund in controversy. No right of trial by jury ever existed in such a case.

The order of the General Term should be reversed and that of the Special Term affirmed with costs.

All concur, except PECKHAM, J., not sitting.

Ordered accordingly.

ELIZA M. SLOANE, Respondent, v. CALVIN AMORY STEVENS,
Appellant.

The will of O'C., contained various devises and bequests to different parties, and also this clause: "I hereby release all claims or demands which I may have at my death against any person or persons named in *this* will." At the time of the execution of the will the testator was conducting, as counsel, a litigation for defendant; the latter was not named in the will. At the close of the will the testator revoked all former "wills and codicils." By a codicil, subsequently executed, which the testator described therein as the "first codicil to his last will," he released three persons named from all claims against them. Two of these were named in the will; one was not. Immediately following this was a provision giving to defendant, whom he described as his "faithful and honorable friend," all books, papers, etc., relating to the claim in litigation. In an action to recover for legal services rendered by the testator in said litigation *held*, that defendant was not released from liability by the said provision of the will.

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The general rule that a will and codicil are to be taken and construed together as constituting one testamentary act, does not apply where anything appears in the instrument showing that the word "will" was not intended to cover or embrace the codicil.

(Argued June 21, 1887; decided October 11, 1887.)

APPEAL from order of the General Term of the Superior Court of the city of New York made February 7, 1887, which affirmed an interlocutory judgment overruling a demurrer to the complaint herein.

This action was brought by plaintiff as assignee of the executors of Charles O'Connor, deceased, to recover for professional services rendered by him as counsel for defendant in what was known and described as the "Tennessee Bond Cases."

The complaint set forth the will of O'Connor and a codicil thereto, alleged the rendition of the services and non-payment therefor.

The demurrer was based upon the ground that in and by the will defendant was released from all liability.

The material portions of the will and codicil are set forth in the complaint.

John C. F. Gardner for appellant. The original will and codicil together make one last will, in the same manner as if the original will were written anew, embodying the codicil, and then the whole executed anew. (*Washburn v. Sewell*, 4 Metc. 66; *Sherer v. Bishop*, 4 Brown's Ch. 55; *Byne v. Curry*, 2 Cr. & M. 603; 4 Thyrwhitt's Exch. 479; *Day v. Croft*, 4 Beav. 561; *Doe dem. York v. Walker*, 12 M. & W. 591, 599; 1 Williams on Exrs. [6th Am. ed.] 225; 1 Redf. on Wills [4th ed.] 368; 1 Redf. on Wills, chap. 8, § 6; *Perkins v. Micklethwaite*, 1 P. Wms. 274.) The codicil operates as its republication, and all of the will is presumed to be in the mind of the testator at the execution of the codicil. (1 Jarman on Wills [5th Am. ed.] 364; *Payne v. Payne*, 18 Cal. 291; *Jones v. Shewmaker*, 35 Ga. 151; *Duncan v. Duncan*, 23 Ill. 364; *Beall v. Cunningham*, 3 B. M. [Ky.] 390; *Armstrong v. Armstrong*, 14 id. 338; 4 Dane's Abridg. chap. 127,

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art. 1, § 11, p. 550; *Haven v. Foster*, 14 Pick. 534; *Washburn v. Sewell*, 4 Metc. 63; *Brimmer v. Sohler*, 1 Cush. 118; *Tilden v. Tilden*, 13 Gray, 103; *Hosea v. Jacobs*, 98 Mass. 65; *Snow v. Foley*, 119 id. 102; *Brownell v. De Wolf*, 5 Mason [Me.] 486; *Van Cortland v. Kipp*, 1 Hill, 590; *Westcott v. Cady*, 5 Johns. Ch. 343; *Lynch v. Prendergast*, 67 Barb. [S. C.] 504; *Howland v. Un. Theo. Sem.*, 5 N. Y. 193; *Van Alstyne v. Van Alstyne*, 28 id. 375; *Murray v. Oliver*, 6 Ired. Eq. [N. C.] 55; *Collier v. Collier's Exrs.* 3 O. St. 369; *Cole v. Smith*, 4 Penn. St. 376; *Smith v. Puryear*, 3 Heisk. 706; R. S. chap. 3, § 3, p. 59; *Haven v. Foster*, 14 Pick. 534, 547; *Washburn v. Sewell*, 4 Metc. 63; *Gray v. Sherman*, 5 Allen, 198.) Mr. O'Connor's intention to release Mr. Stevens can only be negatived by the contents of the codicil, showing by internal evidence, not that such intention had no existence, but that a contrary intent was entertained. (*Cole v. Smith*, *supra*; 1 Redf. on Wills [4th ed.] 368.) In collecting, the intention of the testator courts are bound by precedent and authorities in point and upon identity of language, they are rather to follow settled authority than conjectural interpretation. (*Myers v. Eddy*, 47 Barb. 263.)

Albert G. McDonald for respondent. The dispositions made by a will are not to be disturbed by a codicil further than is necessary in order to give effect to the testator's intention in fact; and the will is affected only so far as there is repugnancy between it and the codicil, while in all other respects the purpose and intent of the testator manifested in the will are deemed to be unchanged. (*Pierpont v. Patrick*, 53 N. Y. 595.) Where a testator expresses in the codicil a determination to alter his will in one particular, he thereby negatives by implication, any intention to alter it in any other respect. (*Quincy v. Rogers*, 9 Cush. 296; *Wetmore v. Parker*, 52 N. Y. 462; *Alsop's Appeal*, 9 Penn. St. 374, 381; *Hopwood v. Hopwood*, 7 H. L. C. 740; 5 Jurist [N. S.] 897; *Garrett v. Garrett*, 2 Strob. Eq. [S. C.] 283; *Gold v. Judson*, 21 Conn. 616; *Abney v. Miller*, 2 Atk. 593; *Blundell v. Mead*,

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1 Madd. 433; *All S. Coll. v. Coddington*, 1 P. Wms. 597; *Cole v. Scott*, 16 Sim. 259; 1 McN. & G. 517; Dayton on Surr. 145; *Stillwell v. Mallersh*, 20 L. J. R. [N. S.] Ch. 356; 5 Eng. L. & Eq. Rep. 185.)

FINCH, J. One would hardly have expected that the will of so eminent and able a lawyer as the late Charles O'Connor would come before us for construction, and present a question quite debatable and involving some difficulty. He made his will, about which as it stood at the date of its execution there was no ambiguity, and which had the clearness and precision we were certain to anticipate. But fifteen months later, and about two weeks before his death, he made and executed a codicil which creates a serious difficulty, and, if drawn by him or at his verbal dictation, may have some explanation in his failing health. By the terms of the will he released in its sixth clause certain of his debtors, conveying his purpose in the following language: "I hereby release all claims or demands, which I may have at my death, against any person or persons named in *this* will." In the codicil which he executed, his attention was again drawn to his debtors, and his duty or pleasure as it respected their indebtedness to him, for its fourth clause provides: "to Francis C. Barlow, Samuel Ward and Edmund Elmendorf, Jr., respectively, I give any sums of money in which any of them may chance to stand indebted to me at the time of my death. Notes, if found, etc., to be canceled and delivered up." Immediately following this is the provision out of which the present controversy has arisen and which reads thus: "All books, papers, duplicates, etc., having any relation to the Tennessee bondholders' claims I give to my faithful and honorable friend, C. Amory Stevens, to use in his discretion." The representatives of O'Connor have sued Stevens to recover \$50,000 for legal services of their testator, in the case referred to. The complaint sets out the will and codicil in full, and a schedule of the services claimed, which ante-dated both the will and the codicil, except the last item which is earlier than the codicil by about a month. The defendant has demurred,

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insisting that by the terms of the will he is released and discharged from all liability. We cannot, therefore, stray outside of or beyond the allegations of the pleading. If there be extrinsic facts bearing upon the construction of the will and codicil, they are not now before us, and we must treat the case as if there were none material or admissible and be guided only by the words of the testator. The dispute turns upon the meaning of the phrase, "in this will," and seeks to evolve the sense in which it was used. The appellant argues that the will included the codicil, and the two instruments together constituted one testamentary act; that the execution of the codicil was a republication of the will as of that date, and the two instruments are to be read together as if their provisions had all been embodied in one, then for the first time executed, and that the testator thoroughly knew the rule and appreciated its force, and must be assumed to have intended when he released those "named in this will" to have intended to release also those named in any codicil which might thereafter be executed, and become part and parcel of the testamentary act. There is abundance of authority establishing the general rule, (*Sherer v. Bishop*, 4 Brown's Ch. Rep. 55; *Doe v. Walker*, 12 M. & W. 591; *Washburn v. Sewall*, 4 Metc. 63; *Van Cortlandt v. Kip*, 1 Hill, 590; *Caulfield v. Sullivan*, 85 N. Y. 153); and if it stood without limitation it would go far to justify the contention of the appellant. But while the word "will" may and often does cover codicils afterwards made, and embrace the entire testamentary act, it nevertheless, as frequently and more naturally is descriptive of the particular instrument as distinguished from that other and different instrument denominated a codicil. Where both instruments exist, however in the end and for many purposes they may constitute one testamentary act, they are nevertheless properly described, the one as a will and the other as a codicil, and those are appropriate words to discriminate and distinguish between them. In such case a testator may mean by the phrase "this will" the instrument as first prepared and not as subsequently modified by a codicil; and since, in questions

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of construction, the intention of the testator is to govern, it becomes necessary to determine in which sense he used the word. It has, therefore, been decided that the word "will" does not cover or embrace the codicil where anything appears to show that it was not intended to do so. (*Fuller v. Hooper*, 2 Ves. Sr. 333; *Cole v. Scott*, 19 L. J. R. [N. S.] 63; *Pierpont v. Patrick*, 53 N. Y. 591; *Wetmore v. Parker*, 52 N. Y. 450, 463.) These cases show the distinction between the will as a final testamentary act and the will as an instrument distinguished from another instrument called a codicil; and show that the former instrument will speak from its own date, and not from the death of the testator, where such an intent is manifest.

The testator seems to have had in mind this distinction, and discriminated between the two instruments. At the close of the will he formally revokes all previous "wills and codicils." He treats the two or more instruments not as together constituting wills and revocable by that name, but as separate and distinct instruments, and revokes not one but each, and by their appropriate and usual designation. The release which he gave came at the close of the will, and after he had named all to whom it was to apply. There can be no doubt that, when he executed the will in which Stevens was not named, he did not then mean to release the latter. If he subsequently formed a different intention we should expect to see it manifested. The failure to do so becomes more significant when we observe that he describes the codicil by that appropriate name saying: "This is Charles O'Connor's first codicil to his last will and testament. This instrument made and signed April 28, 1884." Words of release are absent as to Stevens although present as to others. Ward was not named in the will and so was released in the codicil. Stevens was not named in the will nor released in the codicil. Barlow and Elmendorf were named in the will and so discharged, but were again named in the codicil and again formally released. The appellant seeks to give a reason for this beyond forgetfulness on the one hand, or abundant caution on the other. He says the reason for the clause

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was to require the delivery up and cancellation of notes, etc., held against Barlow and Elmendorf. But that provision is merely incidental and does not account for the words of release which, as to these two persons, were needless. To make the surrender of evidences of debt the motive of the clause is to elevate the incident to the place of the principal, or seize upon a casual and, perhaps, needless remark as the key of an argument or the doctrine of a judgment. Precisely why the two legatees already released by the will were released by the codicil it is not easy to determine; but the materiality of the clause lies mainly in the fact that the attention of the testator was drawn to the case of his debtors, and so strongly drawn as to induce a repetition, and, nevertheless, in the next clause Stevens is named but without words of release.

An examination of that clause indicates a very distinct and definite purpose. In the progress of the Tennessee case the testator had doubtless accumulated important and material papers, his own briefs and memoranda being of great utility and value to his client. Mr. O'Connor had a lien upon all these papers for his compensation and probably realized that after his death his representatives might withhold them from a successor until the debt was paid or secured. But this step might be very troublesome and injurious to Stevens. The appeal to the Federal Court of last resort was approaching argument, and the prompt possession of the papers might be very important to the litigant deprived of his counsel, by death. The testator had great confidence in Stevens, and so he gave the papers to him, thereby waiving his lien and calling his client "my faithful and honorable friend." His meaning seems to have been that he could trust Stevens to make a fair and honorable settlement without the coercion of a lien and the withholding of books and papers, and so the testator directed that course to be pursued. Of course this was a needless precaution if the debt was released for the lien would fall with it, and the naked surrender of the lien carries an implication of a purpose to retain the debt.

Recurring now to the will, certain portions of it become

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important. The release is of persons named in "*this* will;" not "in my will" as might have been the expression if the testator looked forward to codicils naming others, but in *this* will; that is, in the will which I now, on this day, make. At that date a large part of the debt of Stevens had accrued. The testator knew him as one of his debtors and plainly then intended not to release or discharge him. The persons to be discharged were identified by the phrase "named in *this* will;" not in some other will or codicil to be possibly thereafter made, but named in *that* will and so then and there identified. That was the clear and certain construction of the words "in this will" when it was executed, and that meaning and legal effect cannot be changed by the codicil unless the codicil shows an intent to make the change. This codicil does not. Its intent points in the contrary direction. Its purpose was other and different. Our conclusion, therefore, is in harmony with that of the courts below.

The order should be affirmed, with costs, but with leave to the defendant, upon payment of costs, to withdraw his demurrer and serve an answer within twenty days from the entry of judgment.

All concur, except RAPALLO, J., not voting.

Order affirmed.

ROBERT L. DAY et al., Respondents, v. THE OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY, Appellant, and others.

In this State and in Vermont a railroad corporation by omitting to perform a duty imposed upon it by its charter does not, *ipso facto*, and, in the absence of words in the charter making such non-compliance a limitation upon the original grant of power, lose its corporate character; to dissolve the corporation there must be a judicial proceeding and judgment declaring the forfeiture.

Where a railroad corporation is authorized to lease the roads of other similar corporations it may, in the absence of any statutory limitation, lease a road operated in and under the laws of another State unless the law of

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A corporation organized under the General Railroad Act has power under the act of 1839 (Chap. 218, Laws of 1839), to contract "with any other railroad corporation" for the use of its road in any manner not "inconsistent with the provision of the charter" of such other corporation.

By act of the legislature of Vermont, passed in October, 1872, the L. V. E. R. R. Co., was created to build a railroad between points specified. The act declared that: "If said corporation shall not within ten years from the approval of this act commence the construction of said railroad then said corporation shall be dissolved." The road was not constructed within ten years, but was thereafter built under an agreement between said corporation, the defendant, the O. & L. C. R. R. Co., and other parties, and was leased to defendant. In an action by holders of certain bonds issued by defendant among other things, to restrain it from carrying out the provisions of the lease, on the ground, among others, that the L. V. E. R. R. Co., by its omission to commence the construction of its road within the time prescribed, lost power to do a corporate act and its existence ended, *held*, that non-compliance with the requirement did not of itself work a dissolution of the corporation.

In re B. W. & N. R. Co. (72 N. Y. 245); *S. C.* (75 N. Y. 335); *B. S. T. Co. v. City of B.* (78 N. Y. 525) distinguished.

It was provided in and by the said agreement that the L. V. E. R. R. Co., should issue so many of its first mortgage bonds, not exceeding a sum specified, as should be sufficient to construct its road; that these should be purchased by the parties to the agreement, other than the two corporations, and defendant agreed when the road was completed to take a lease of it on terms and conditions specified; after the completion of the road a lease was executed as agreed. By the terms of the lease defendant agreed to equip, maintain and operate the demised road as a part of its line, to pay taxes assessed thereon and certain other expenses, and to pay at maturity the principal and interest of the bonds; also, that the whole gross earnings of the demised road should be used and applied, first, to pay the interest accruing, and second, for the creation of a sinking fund for the payment of the principal of the bonds. *Held*, that the agreement and lease were within the power of the two corporations to make and were valid.

The bonds held by plaintiffs were "income mortgage bonds" issued by defendant under a special act passed in 1880 (Chap. 73, Laws of 1880). Only the principal of these bonds was secured by the mortgage, the payment of interest was subject to the condition that "the net earnings of the railroad and other property of the company for each period," *i. e.*, each year, should be sufficient to pay it; the amount of net earnings for each period to be determined by defendant's board of directors, by the coupons, the company promised to pay the sum named, "or so much thereof as its net earnings for the year then ending, according to the terms of the bond, will pay." The property mortgaged included all the prop-

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erty, franchise, income and profits, and all "privileges, rights," etc., and all rolling stock and other property "now owned, or hereafter to be owned, or acquired by said company." By the terms of the mortgage it was made subject to the right of the mortgagor "to retain the free and uncontrolled use, enjoyment, possession and management" of the mortgaged property, so long as no default was made in payment, in accordance with the terms of the bonds. The mortgage stated that it was given primarily to secure certain bonds described as "first consolidated mortgage bonds of the company," and secondarily the payment of the principal but not the interest of the "income mortgage bonds." It was also further provided that whenever the mortgagor acquired any franchises, or "property or interests of any name or nature, for the use of or in connection with its railroad," they should be held subject to the lien of the mortgage. It was claimed on behalf of plaintiffs that the income of defendant was charged with the payment of plaintiffs' bonds and could not be applied upon any contract subsequently entered into until the charge was extinguished; that the net earnings were insufficient to meet the accruing interest on the income bonds, and if diverted for the purpose of carrying out the lease would be absorbed. *Held*, that, so far as the interest was concerned, plaintiffs were simply contract creditors, having no lien, or right other than to have it paid out of the proper fund, *i. e.*, "the net earnings;" that the power of the company to change the condition of the road by additions, extensions, or improvements consistent with the purposes of its incorporation, was not restricted by the provisions referred to; that the parties contemplated a line of active and efficient railroad, managed in the usual manner according to the discretion of defendant's directors, not one in suspense or liquidation; and that, therefore, the directors had the right to use the earnings of the corporation for such improvements or other lawful purposes in its business as they might think best, and plaintiffs were not entitled to maintain the action.

(Argued June 23, 1887; decided October 11, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made December 2, 1886, which affirmed an interlocutory judgment in favor of plaintiffs, entered upon an order overruling a demurrer to plaintiffs' complaint.

This action was brought by plaintiffs, as owners of certain bonds issued by defendant, the Ogdensburgh and Lake Champlain Railroad Company, known as "income mortgage bonds," on their own behalf and that of owners of other like bonds to restrain said defendant from using its net earnings for the

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purpose of carrying out the terms of a lease executed to it by the Lamoile Valley Extension Railroad Company, by paying bonds issued by that company and for an accounting for moneys already so paid.

The material facts stated in the complaint are set forth in the opinion.

Denis O'Brien, D. G. Griffin and Louis Hasbrouck for appellant. The lease is within the powers of the contracting corporations. (Vt. R. S. § 3303; 34 Vt. 1; Story on Conf. of Laws [8th ed.], 175, § 106, note *a*.) The Laws of 1839, chapter 218, confer power upon railroad corporations, not only to acquire, but also to transfer to other railroad corporations by lease, the exclusive right to use and enjoy the property and privileges of the lessor in such contract. (*Woodruff v. Erie R. Co.*, 93 N. Y. 609-616; 46 id. 644; 54 How. Pr. 183; 35 Hun, 226; Abb's Pr. [N. S.] 16, 249; 4 Hun, 268, 712; 63 N. Y. 176; *Arnot v. E. R. Co.*, 5 Hun, 608; *In re N. Y. L. & W. R. R. Co.*, 35 Hun, 220; 99 N. Y. 12; 93 id. 615; *Stewart v. L. V. R. R. Co.*, 38 N. J. 505; *Sturges v. Knapp*, 31 Vt. 1; 33 id. 486; 36 id. 439; *In re Staten Island R. R. Co.*, 103 N. Y., 251; *Penn. Co. v. St. L. & T. Co.*, 118 U. S. 290; *P. & C. R. R. Co. v. C. & C. Co.*, 8 Biss. C. Ct. 456.) The assent of the stockholders of respective companies to the lease, was not necessary. (2 Redf. on R'ys, 112.) To the agreement under consideration, no single corporator of either company having ever been heard to object, and the agreement having been performed by the execution of the lease, it has been perfectly ratified and validated as against the corporators and the companies themselves; much more so as against strangers to the corporation like the plaintiffs, who were never qualified to raise the question. (*Olcott v. Tioga R. R. Co.*, 27 N. Y. 546.) The preliminary agreement and the lease are not in effect an undertaking by the Ogdensburg and Lake Champlain Railroad Company, to furnish funds to build a road in Vermont. (*T. & C. R. R. Co. v. Spencer*, 42 Hun, 496; *Weterhans v. N. C. & S. L. R. R. Co.*, 4 N. Y. 541; *V. & C. R. Co. v. V. C. R.*

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Co., 34 Vt. 1; *Durfee v. Old C. R. R. Co.*, 5 Allen [Mass.], 230; *Stewart v. L. I. R. R. Co.*, 102 N. Y. 601.) The alleged omission of the Lamoile Valley Extension Company to begin the construction of its road within ten years did not affect a dissolution of the corporation. (Angel & Ames on Corp. § 777; *People v. Manhattan Co. Bk.*, 9 Wend. 351; *In re Newtown R. Co.*, 72 N. Y. 245; 75 id. 335; *Brooklyn S. T. Co. v. City of Brooklyn*, 78 id. 529; *Vt. & C. R. R. Co. v. C. V. R. R. Co.*, 34 Vt. 55.) The lease does not provide for a violation of the provisions of the income bonds of the Ogdensburg & Lake Champlain Railroad Company. (Jones on Ry. Secur. §§ 114-120, 316; *Gal. R. R. Co. v. Cowdrey*, 11 Wall. 459, 482, 483; Wood on Railroads, § 464, note 6; *Dow v. R. R. Co.*, 20 Fed. Rep. 768; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 617; 94 U. S. 798; 107 Mass. 1; *St. John v. E. R. Co.*, 22 Wall. 136.) The rents for the year accruing under leases taken by the company after the issuing of the preferred stock were properly paid. (*Warren v. King*, 108 U. S. 389; *Perkins v. Depford P. Co.*, 18 Simons, 277; *Nickerson v. Erie Ry. Co.*, 119 U. S. 296; *Middletown v. B. V. & R. R. Co.*, 53 Conn. 351; *Doherty v. Allman*, 3 App. Cas. 709.) An agreement either in parol or in writing, to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment thereon. (*Christmass v. Russell*, 14 Wall. 69; *Trist v. Child*, 21 id. 441; *Conselyea v. Drew*, 24 Week. Dig. 581; *Dillon v. Bernard*, 21 Wall. 430; 1 Barb. 454; 89 N. Y. 512; 16 B. Reg. 448.) The plaintiffs are estopped from questioning the validity of the lease. (*C. & A. R. R. Co. v. Mays, L. & E. H. R. R. Co.*, 7 At. Rep. 523.) The plaintiffs are not qualified to sue for a redress of the alleged *ultra vires* act of the Lamoile Valley Extension Company. (Green Brice's *Ultra Vires*, 693; *Haight v. N. Y. El. R. Co.*, 49 How. Pr. 20.) The plaintiffs are not qualified to sue for the redress of the alleged *ultra vires* acts of the Ogdensburg and Lake Champlain Company. (Green Brice's *Ultra Vires*, 648-652; *Hills v. N. R. R. Co. of*

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Beunos Ayres, 5 Ch. App. C. 621; *U. S. v. U. P. R. Co.*, 98 U. S. 569-614; *Smith v. R. R. Co.*, 99 id. 398; *Van Wiel v. Winston*, 115 id. 245; *Bewley v. Eq. L. As. Co.*, 61 How. Pr. 344; *Adee v. Bigler*, 81 N. Y. 349.) The bill for an injunction cannot be maintained, because the complainants have an adequate remedy at law. (*Bates v. And. R. R. Co.*, 49 Me. 491; *Marlor v. T. & Pac. Ry. Co.*, 17 Am. & Eng. Ry. C. 257; *Mills v. N. R. R. Co.*, L. R., 5 Ch. App. C. 261.) The plaintiffs, even if they were qualified as creditors of the corporation to maintain an action for damages or for an accounting, do not show their performances of the necessary conditions to authorize its institution. (*Memphis City v. Dean*, 8 Wall. 73; *Hawes v. Oakland*, 14 Otto, 461; *Baker v. N. Y. & L. E. R. R. Co.*, 96 N. Y. 444; 69 id. 154.)

Edward C. James and *A. R. Herriman* for respondents. In the ordinary case of a mortgage, given by a railroad company to secure the payment of the principal and interest of a regular issue of bonds upon all the property of a company, including its income, the whole earnings belong to the company and are subject to its control, the same as the other mortgaged property, until possession is taken by a receiver, or something equivalent is done to restrain the debtor company (*Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; *Gilman v. I. & M. T. Co.*, 91 U. S. 603; *Am. Bridge Co. v. Heidelberg*, 94 id. 798; *Fosdick v. Schall*, 99 id. 235, 253; *Jones on R. R.* §§ 114-120); but it is competent for the parties to agree that future net earnings and profits shall be held in equity for the mortgagee; and, under such a contract, such income, whenever received, is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is entitled to it. (*Pullan v. C., etc., R. R. Co.*, 5 Biss. 237; *Bucks v. M. & L. R. R. Co.*, 4 Cent. L. J. 430.) No particular form of words is necessary to create an equitable lien upon or assignment of a fund, but all the circumstances of the transaction are to be considered. (*Williams v. Ingersoll*, 89 N. Y. 508, 521.) Where it is agreed by a railroad company that all its

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current net earnings and income, after deducting current expenses and needful expenditures for maintaining and operating its railroad and equipments, shall be applied and used for the payment of interest upon its bonds, this amounts in equity to a specific appropriation, and gives to the bondholders an equitable lien upon the income of the company. (*Barry v. M. K. & T. R. Co.*, 27 Fed. R. 1; *Ketchum v. St. Louis*, 101 U. S. 306; *Rutten v. U. P. Ry. Co.*, 17 Fed. R. 480; *Park v. Grant L. Works*, 2 Cent. R. 185; *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 157.) The income bondholders are entitled to the payment of interest upon their bonds, out of the net income of the debtor company in preference to payments other than those specified in their bonds. (*Barry v. M. K. & T. R. Co.*, 27 Fed. R. 1, 7, 8; *Williams v. Ingersoll*, 89 N. Y. 508-581; *Ketchum v. St. Louis*, 101 U. S. 303; *Rutten v. U. P. R. Co.*, 17 Fed. R. 480; *Park v. Grant L. Works*, 2 Cent. R. 185; *Boardman v. L. S. & M. S. R. Co.*, 84 N. Y. 158.) The payment of interest upon the bonds of the Lamoile Valley Extension Railroad Company and of a sum of money annually into a sinking fund to redeem said bonds, under said agreement and lease, are not purposes to which the income of the Ogdensburg Company can be appropriated as between the Ogdensburg Company and its income bondholders. No such application of said income was either authorized or contemplated. (*Barry v. M. K. & T. R. Co.* 27 Fed. R. 1; *U. P. R. R. Co. v. U. S.*, 99 U. S. 420.) The agreement and lease are *ultra vires*. (*T. & B. R. R. Co. v. B. H. T. & W. R. Co.*, 86 N. Y. 107, 117; *Thomas v. R. R. Co.*, 101 U. S. 71; *Woodruff v. E. R. Co.*, 93 N. Y. 609, 616; *People v. A. & V. R. R. Co.*, 77 id. 232; *Fisher v. N. Y. C. & H. R. R. R. Co.*, 46 id. 644; *Fisher v. Met. El. R. R. Co.*, 34 Hun, 433; *In re N. Y., L. & W. R. R. Co.*, 35, id. 220, 227; *O. & L. C. R. R. Co. v. V. & C. R. R. Co.*, 16 Abb. [N. S.] 249, 260; *Penn. R. Co. v. St. L. A. & T. H. R. R. Co.*, 6 Sup. Ct. R. 1094.) The plaintiffs are in a position to assert the *ultra vires* character of the agreements. (Brice's *Ultra Vires*, 511.) It is not lawful for a railroad

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company to use any of its funds in the purchase of any stock of its own or in any other corporation. (Laws of 1850, chap. 140, § 8; R. S. [8th ed.] 1530, 1531; *Milbank v. N Y., L. E. & W. R. R. Co.*, 64 How. Pr. 20, 24.) The construction of the railroad not having been commenced within ten years from the approval of the act of incorporation, its corporate existence thereby became extinct, and its power to make any contracts for the construction of its railroad ceased. (*In re B. W. & N. R. R. Co.*, 72 N. Y. 245; 75 id. 335; *Brooklyn S. T. Co. v. Brooklyn*, 78 id. 524.)

DANFORTH, J. The plaintiffs object, *first*, that certain acts of the defendant, the Ogdensburg & Lake Champlain Railroad Company, done and threatened, are in excess of its powers and illegal; *second*, that if otherwise valid the defendant has so bound itself by contract that the appropriation of its earnings to carry out those acts is a breach of that contract. So far they have succeeded. Interlocutory judgment was given in their favor at Special Term and affirmed at General Term. The questions submitted to the court were raised by demurrer to the complaint, and this appeal involves an inquiry as to whether the allegations of that pleading are sufficient to constitute a cause of action.

The defendant, appellant here, is a railroad corporation organized and incorporated under and in pursuance of the laws of the State of New York. As such, it owned and operated a line of railroad from Ogdensburg to Rouse's Point, in this State, and in the year 1880 was authorized by a special act of the legislature (Laws of 1880, chap. 73) to issue bonds in such form, and payable at such time as its directors might determine, and secure the whole or any part of said bonds by a mortgage upon its franchise, railroad and other property, both real and personal. Prior to this time, in October, 1872, the legislature of the State of Vermont created a railroad corporation under the name of "The Lamoile Valley Extension Railroad Company," to build a railroad from "some point in the towns of Swanton and Alburgh to the north line of

this State, in the town of Alburgh, with the right to build and maintain a bridge with a suitable and convenient draw for the passage of vessels, from some convenient point at or near the eastern shore of the Missisquoi Bay, in the town of Swanton, to some point at or near the western shore of Missisquoi bay, in the town of Alburgh," a distance of about twelve miles. The act also provides that its directors may at any time make such alterations in the route or location of said road as they may deem necessary or expedient, and also that the corporation "may contract with the managers of any railroad company to perform all transportation of persons and property upon and over said road, and may lease their said road, and do such other things as may be necessary to build and run said road." But declares that "if said corporation shall not, within ten years from the approval of this act, commence the construction of said railroad, then said corporation shall be dissolved."

Ten years and more elapsed after the charter was approved, and the construction of the road had not been commenced, but on the 2d of February, 1883, the Lamoile Valley Extension Company entered into an agreement with Vanderbilt and Phelps and the defendant, the Ogdensburg & Lake Champlain Railroad Company, by which, after reciting that with a view to establish all rail routes for traffic and passengers between the west and northern New England, and to form necessary connections to carry the same into effect, a new railroad must be constructed from Rouses Point to Maquam Bay or Swanton, in the State of Vermont, and the railroad companies above named deem it for their interests to have such railroad constructed, and such connections made, the Lamoile Valley Extension Company agreed to issue so many first mortgage bonds, not exceeding \$350,000, as should be sufficient to construct the road and bridges. Vanderbilt and Phelps agreed to purchase them for that purpose, and the Ogdensburg & Lake Champlain Railroad Company agreed that when the road should be completed it would take a lease

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of it in perpetuity in the form and on the conditions then agreed upon. Subsequently the road was built, and on the 31st of December, 1883, an agreement was made between the Lamoile Valley Extension Company, of the first part, and the Ogdensburg & Lake Champlain Railroad Company, of the second part, by which the former leased to the other its railroad, "together with all the lands on which said railroad is constructed, including all the lands acquired, held and owned by the parties of the first part for roadway, station, and all other purposes of their incorporation, and all the rights, easements, franchises and privileges in connection therewith, or which are appurtenant thereto, and all the superstructure of said railroad, of whatever name or nature, and all the buildings, bridges, wharves, docks and piers and structures of whatever name or nature, pertaining to said railroad, and the land and premises on which the same are standing, and all the rights, privileges and franchise of the said parties of the first part, now possessed by them, including their right to construct, maintain and operate said railroad, and all the rights, privileges and franchises which the said parties of the first part may hereafter lawfully have, obtain and exercise. To have and to hold the same from the date thereof in perpetuity."

The defendant, the Ogdensburg & Lake Champlain Railroad Company, on its part agreed to equip, maintain and operate the demised railroad as a part of its line, and to keep it, "its bridges," etc., in good order; to pay taxes assessed upon it, and certain other expenses; to pay also the interest and principal at maturity of the bonds issued to Vanderbilt and Phelps under the agreement of February 2, 1883; and, further, "that the whole of the annual gross earnings of the demised railroad shall be annually applied and used, first, to the payment of the interest upon said bonds as the same becomes payable; and, second, to the creation of and payment into a sinking fund for the gradual redemption of and payment of the principal of said bonds, of which sinking fund the Ogdensburg & Lake Champlain Railroad Company were made the trustees, and an amount of said bonds equal to one-

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fiftieth part of the whole amount thereof shall annually * * * be canceled, it being understood, however, that whether said gross earnings are adequate to these purposes or not, the parties of the second part are to pay semi-annually the interest on said bonds as the same becomes due, and annually obtain and cancel one-fiftieth part of the whole amount of said bonds."

The learned counsel for the respondents contend that, by reason of the omission of the Lamoile Valley Extension Company to commence the construction of its road within the time prescribed by the charter, its existence ended and left it without power to do a corporate act. The language of the act is that in such event "said corporation shall be dissolved." In this State it is well settled that under a similar statute dissolution is not effected by a mere failure to perform the condition, nor without judicial proceeding and judgment. The cases cited for the appellant (*Matter of B. W. & N. R. Co.*, 72 N. Y. 245; 75 id. 335; *Brooklyn S. T. Co. v. Brooklyn*, 78 id. 525) are easily distinguishable from the case at bar. The statute before the court in those cases provided, in express terms, that if the railroad company in question failed to finish its road within a time specified, "its corporate existence and powers shall cease." It was held that the statute executed itself, and that non-compliance with the condition extinguished the corporation in question by virtue of an express limitation upon the original grant of corporate power. But the general principle was recognized that, in the absence of such or like language, a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not, *ipso facto*, lose its corporate character. It does not appear that any different effect is given to such a statute by the courts of Vermont; but, on the contrary, in *Vermont & Canada Railroad Company v. Vermont Central Railroad Company* (34 Vt. 2), the Supreme Court of that State say it is beyond question that, unless the legislature undertake to declare a forfeiture upon facts that have already occurred, it appertains to the judicial department of the gov-

ernment to determine whether such forfeiture has been incurred. So far, therefore, the courts agree.

It is next argued for the respondents that the arrangement expressed through these instruments, so far as the Ogdensburg & Lake Champlain Railroad Company is concerned, is beyond the capacity and power of that corporation. We have seen that the Vermont Railroad Company had corporate powers, and among those expressly given by its charter is a power to lease its road. It had, therefore, contracting capacity, and was a good party to deal with. The Ogdensburg & Lake Champlain Railroad, on its part, lacked no power expressly given by statute to similar corporations in this State, nor any which, as incident and necessary thereto, might enable it to carry on the objects of the incorporation. Among other statutes to which it might appeal was one "authorizing railroad companies to contract with each other." (Laws of 1839, chap. 218.) Under this act it might lawfully agree "with any other railroad corporation" for the use of its road in any manner not "inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." The contract in question is not affected by the limitation expressed in the act, and unless we are to imply into it another restriction and say that its operation must be confined to contracts with roads operating in and under the laws of this State, the lease must be held valid between the parties. We see no reason for such restriction, nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction. A corporation given capacity to contract may exercise that capacity with any party in or outside the limits of the State, unless the law making power of that other State forbids. (*Bank of Augusta v. Earle*, 13 Peters, 519). Our own statutes and the interpretation given to them by the courts are to that effect. (*Woodruff v. Erie R. Co.* 93 N. Y. 609; *In re N. Y. L. & W. R. R. Co.* 99 id. 12; *In re Peter Townsend* 39 id. 171; *In re Staten Island Rapid Tr. Co.* 103 id. 251.) In this case there is no such prohibition. Nor do we find that the defend-

ant has hired or that the lease covers an incomplete road. It was indeed finished in performance of an agreement entered into at the same time the lease was bargained for, but the parties intended only a completed road, and before the lease was executed the road was completed. It was thought to be a wise exercise of the power conferred upon its directors in the management of its affairs. Its object, to secure a continuous road with connections necessary to extend its business and so accommodate freightors and passengers, and at the same time add to its receipts, is opposed to no principle of public policy. There is no suggestion that it was fraudulently made, nor but that the terms are reasonable, agreed upon in good faith and in the honest belief that the interests of the corporation would by it be promoted. We think the agreement was not beyond the power of the corporations to make; that the lessor was able and not restrained to make the lease; that the lessee was capable, and not disabled, to receive the thing demised, and, therefore, as between the parties that the lease was valid. The payment of interest upon the bonds issued by the Lamoile company, and the annual payment of a portion of the principal of those bonds was, by way of rent, merely for the use of the road, and the privileges procured through the lease. If the lease was valid, whether the lessor paid the rent in money, or its own bonds or promises, or by discharging an obligation of the lessee could make no difference. In either way it obtained credit in connection with its business. There was a choice of means to effect a lawful purpose, and it was within the discretion of the contracting parties to adopt one rather than the other as a part of the transaction.

We are next to consider the relation of the parties and their respective rights as defined by contract. So far as presented in this action they depend upon the true construction of the terms of the income bonds above referred to, and part of which are held and owned by the plaintiffs. Their claim is that the defendant has no other source "or property than its own earnings" to meet the obligations incurred to the Lamoile

company; that these earnings are insufficient to meet the accruing interest upon the income bonds, and if diverted to the discharge of the new indebtedness will be absorbed thereby, and so they allege that in carrying out the terms of the lease and paying the rent reserved the defendant is diverting money or revenue to which they are entitled under the bonds. The plaintiffs' case is put and must stand, if at all, upon the terms of the bond and upon nothing else. What those are will now appear. The complaint shows that in pursuance of the act of 1880 (*supra*) the company executed its mortgage to trustees, reciting therein its determination to issue two classes of bonds, one to be known as "the first consolidated mortgage bonds," not to exceed in amount \$3,500,000, and the other as "income mortgage bonds," not to exceed in amount \$1,000,000, all payable in forty years from the 1st of April, 1880, with interest on the first class half yearly, and on the second or income bonds, annually, payment of both principal and interest of the first class, but only the principal of the second class to be secured by mortgage. The promise to pay interest upon the latter class is subject to the condition that "the net earnings of the railroad and other property of the company for each period, after satisfying the expenses of operating and maintaining the same, with all taxes, assessments and floating indebtedness, and the interest on all liens, charges, incumbrances and other indebtedness (but not meaning thereby any dividends on the preferred stock of said company) on the property of or owned by said company shall respectively suffice to pay such rate of interest on all of this issue of bonds then outstanding, at the specified dates following each of said periods, or such interest less than six per centum per annum as such net earnings during such periods shall be sufficient to pay upon all said bonds then outstanding, each of the same being entitled to a ratable share thereof, and provided that the interest warrant or coupon of that date, and also all such warrants or coupons which shall have previously matured, be presented and surrendered as aforesaid."

The bond also declares that it is "covenanted and agreed by

and between the said company and the present and future holders of the bond and the interest warrants or coupons thereto annexed, that the words "net earnings" in this bond, and in each of said warrants or coupons, signify the amount remaining of the income of said company from its railroad and other property during each such period after satisfying and discharging all the expenses, interest and other charges aforesaid, and that the board of directors of said company shall determine the amount of such net earnings in each of such periods as aforesaid."

The coupon contains the same condition expressed in fewer words and is a promise on the part of the company to pay the sum named, "or so much thereof as its net earnings for the year then ending according to the terms of the bond will pay." The property mortgaged includes the railroad of the company and all its branches, "together with the franchise of the company, of operating and carrying on the same, * * * and all income and profits, and all * * * privileges, rights and real estate * * * now owned by said company, or which may be hereafter owned or acquired by it," with an exception not material here, together with all its rolling stock, "and other property now owned or hereafter to be owned or acquired by said company, and in any way belonging or appertaining to the said railroad of said company." By the terms of the mortgage it is subject to the right of the railroad company, its successor or assigns to retain the free and uncontrolled use, enjoyment, possession and management of the premises, rights and property granted or intended so to be, so long as it shall pay the principal and interest of said first consolidated mortgage bonds and the principal of said income mortgage bonds according to their terms, and shall keep its covenants and agreements in this deed or mortgage contained. So also the condition which, when performed is to annul and make void the mortgage, is in terms the payment of the first class of bonds, both principal and interest, and the principal only of the second class or income mortgage bonds. These things are restated by an express

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covenant and agreement between the parties to the mortgage "for themselves and their successors and assigns, and for all parties who shall become interested as holders or owners of the bonds in manner following, that is to say: *First.* That this mortgage is given to secure, primarily, the payment of the principal and interest of said first consolidated mortgage bonds of said party of the first part; and, secondarily, after the payment in full of said first consolidated mortgage bonds and the then accrued interest thereon, the payment of the principal (but not the interest thereon) of said income mortgage bonds." *Second.* "That the company will pay at maturity the principal and, as it accrues, the interest of the first consolidated mortgage bonds and the principal of the income bonds." In other respects the same care is exercised in distinguishing between the two classes of bonds and the rights of the holders of interest coupons attached thereto, and when at last provision is made for the distribution of proceeds arising from a forced sale under the mortgage it is directed to be paid, first, upon expenses, etc.; second, upon the interest due on the first class of bonds, then upon the principal of those bonds; and lastly, if any part remains, upon the principal of the income bonds, making no mention of the interest on those bonds, and so marked is this line of exclusion that contemplating the possibility that something might be left after meeting claims thus enumerated, it provides that if any surplus remains it shall be paid over, not to the holder of interest coupons of the income bonds, but to the mortgagor.

The mortgage also provides: "That whenever and as often as the company, its successors or assigns, shall acquire any franchises, lands, equipment or other property, or interest of any name or nature, for the use of, or in connection with its railroad, or for the purpose of its incorporation, it shall be held subject to the lien and trusts of the mortgage, and further mortgage or assurance shall be given upon it if requested."

There are no other provisions bearing upon the proposition before us; and upon those the plaintiffs' position is, that the

income of the defendant, as that phrase is defined in the mortgage from which we have quoted, is charged with the payment of the plaintiffs' bonds, and is not applicable to any contract subsequently entered into until that charge is extinguished. The defendant's contention is that, notwithstanding the terms of the bond and mortgage, its income may be applied to the extension of its road, or to the promotion of any undertaking within the line of its corporate powers, and which, in the judgment of its directors, acting in good faith, will be for the advantage of the company and promote its interests, although such application should so diminish, or even altogether absorb, the fund that no part would remain for payment upon the interest of the income bonds.

The statute declares that every corporation organized as the defendant was, under the act of 1850 (Chap. 140, § 5), shall have a board of directors to manage its affairs; and it must follow that, so long as no provision of law is violated, they are subject to no other supervision than that of the legislature. The plaintiffs, so far as any claim is now involved, are simply contract creditors having a debt against the corporation, but no lien by mortgage, and with no other right than to have it paid out of the proper fund, viz., "its net earnings," the amount of which is to be determined by its board of directors at the expiration of each interest period; and such is the effect and the language of the agreement between the parties that if at one time there should be found a deficiency of income, and at another a surplus of income, the surplus cannot be applied to make up the deficiency then existing, nor reserved to apply upon a subsequent deficiency. Each interest period stands by itself, and the earnings of one period cannot be applied upon any interest coupon except the one for that period. They are not cumulative, and the inquiry at any given period must be whether earnings have accrued during the particular year for which they are demanded; and as the amount is to be determined at specified times and by the directors, so the parties, as we have seen, agreed upon the elements from which such determina-

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tion should be made. It is not the whole income, but so much as remains of the income of the company after satisfying the expenses of operating and maintaining the road, with all taxes, assessments and floating indebtedness, and the interest on all liens, charges, incumbrances and other indebtedness * * * on the property of or owned by said company. This is, at most, an agreement to pay dividends if dividends are earned.

The contention of the learned counsel for the respondents and the effect of the judgment below is that the power of the company to change the condition of the road, although by additions or extensions and improvements consistent with the purposes of its incorporation, is limited and restrained by these provisions. It does not seem probable that such was the intention of the parties. The bonds are to run forty years. The earnings are to be determined at the end of each year. Did the parties suppose that in the meantime the road was to be stationary, or that the developments which time and the competition of new roads, or a demand for greater facilities would require, should be applied only to the road as it existed at the time of the mortgage. When they speak of the expenses of operating and maintaining the road, do they mean the road as it was in 1880? Was it supposed that no changes were to be provided for within the forty years? If so, for what purpose was the agreement made and put into the mortgage that if, and whenever, and as the company should in any manner acquire any franchises, of any nature or description, lands, or other property for the use of its railroad, or in connection with its railroad, they should be held subject to the lien and trusts of the mortgage or other conveyance made, if necessary to convey them to the trustees. Such is the agreement and from that it is plain the parties had in view the prospective wants of the railroad. They must be deemed to have understood that those wants would be supplied in the usual manner; if, upon credit, that an indebtedness would be created, and, if for cash, that both the indebtedness contracted and the cash paid must come either from the earnings of the company or

a sale of its property. In either event it would reduce the income provided for, but at the same time add a new source of income of which the bondholder would have the benefit. In short a fair and just construction of the agreement as expressed in the bond, requires us to hold that the parties contemplated a line of active and efficient railroad, and not a line of road in suspense or liquidation. In other words they provided for a road to be managed in the usual manner according to the discretion and judgment of its directors. Changes so occasioned might at one time diminish and at another increase the net earnings of the road. The operating expenses would be constantly liable to change. Uniformity is not bargained for nor promised. If that was intended it is difficult to see why the bond or mortgage did not provide that the operations of the company during the forty years of credit should be confined to the running of its road between the then termini, instead of providing for the acquisition of new franchises and the subjection of them to the lien of the mortgage. Nothing is said against making the road more useful by improvements or by new tracks, terminal facilities, elevators, leased roads or otherwise, although at an increased expenditure. The implication from the terms used is quite the other way. Nor do I find anything in the provisions regulating the rights of the parties which sustains in any manner the contention denying the power of the directors to use the earnings of the corporation for such improvements or other lawful purposes in its business as they may think best.

I have already given at length the phrases of the bond and mortgage on which reliance is placed, and it is obvious that there are none which in terms declare such prohibition; nor do I think that the construction contended for is warranted by the words actually used, and that, in acceding to that construction, the court below has inserted by implication that which the parties have not expressed, and which, in view of the precise language employed, they seem to have intentionally avoided.

It is not alleged that any portion of the earnings actually

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remain in the hands of the company beyond a sum sufficient to discharge obligations due from it, but that there would have been, and will yet be, a sum of money to be applied upon the income bonds, provided the payments already made upon the lease are canceled and no others provided for. That is not to the point. As the lease is valid and within the powers of the company, and the company entitled to receive all the earnings, they must be applied in the discretion of the directors, and the payments already made must stand.

If these views are correct, it is unnecessary to consider other questions raised by the appellant, and which are not without force, for it follows that there has been no misapplication of the funds or earnings of the road; that there has been no diversion of them from any purpose for which they were intended, nor any violation of the contract under which the plaintiffs claim. The complaint, therefore, fails to state a cause of action, and the defendant could not properly be required to answer. It follows that the demurrer was well taken.

The judgment appealed from should be reversed in both courts, the order of the Special Term overruling the demurrer should be reversed, and the defendant have judgment dismissing the complaint, with costs.

All concur.

Ordered accordingly.

ALBERT DAY, Respondent, v. THE TOWN OF NEW LOTS,
Appellant.

The complaint herein alleged, in substance, that plaintiff purchased certain premises on a mortgage foreclosure sale, and paid the sum bid to the referee making the sale, who made the payments directed by the decree and by order of the court deposited the surplus with the county clerk; that on or about February, 1874, defendant's collector received \$2,197.82 of such surplus from said clerk, and applied it upon a warrant held by him for the collection of an assessment on the premises for a local improvement, which assessment was subsequently adjudged to be illegal and void, and that \$1,499.93 of said sum so received "belonged to and

107	148
111	909
107	148
118	286
107	148
132	377

107	148
159	289

107	148
75 AD	198

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was and still is the property of plaintiff," and was so taken and received without his knowledge or consent. The only question of fact litigated upon the trial was as to the ownership of the surplus, and the only testimony given by plaintiff on this subject was that he paid a subsequent valid assessment for the same improvement. No offer was made by plaintiff to amend his complaint or to conform the pleadings to the proof. *Held*, that judgment was properly rendered dismissing the complaint, as the proof failed to show that plaintiff had any title to the surplus, which belonged to the mortgagor or the owner of the equity of redemption; that any equitable right plaintiff may have had to require the payment of the valid assessment out of the surplus could not be determined, as it was not presented by the pleadings and the real party in interest was not represented in the litigation; that the provisions of the Code of Civil Procedure requiring objections as to defect of parties to be raised by answer or demurrer did not apply, as defendant was only required to plead to the cause of action stated in the complaint.

A judgment must be rendered in conformity with the allegations and proofs of the parties.

It seems it is competent for the court in the judgment in a foreclosure action to direct the land to be sold free of all liens, taxes and assessments or subject thereto, or it may require them to be paid out of the proceeds of sale under such terms and conditions as it shall prescribe.

It is error for the General Term of the Supreme Court to base a reversal of a judgment rendered by a trial court upon facts not proved before or found by it.

While an appellate court under certain circumstances may permit a record not given in evidence below to be produced upon the argument, it is allowable only for the purpose of sustaining the judgment, never for the purpose of reversing it.

In reviewing judgments rendered upon trial before a court or a referee, it is the duty of the appellate court to indulge all reasonable presumptions in support of the judgment and to assume when necessary, that all the evidence in the case was considered, and a conclusion thereon, adverse to the appealing party, reached.

The action was commenced in January, 1884. *Held*, that if any liability was incurred by defendant it was barred by the statute of limitations.

Day v. Town of New Lots (36 Hun, 263), reversed.

(Argued June 27, 1887; decided October 11, 1887.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 11, 1885, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term. (Reported 36 Hun, 263.)

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The nature of the action and the material facts are stated in the opinion.

D. D. Whitney for appellant. The plaintiff had no interest in the surplus money. (36 Hun, 266.) As no requests to find were submitted by the plaintiff, and no exceptions were or could have been taken to the refusal of the court to find, this court is confined to the state of facts as presented in the findings. (*Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85.)

The plaintiff's cause of action against the defendant (if any) was complete at the time the money was so applied to the payment of the void assessment. (*Horn v. Town of New Lots*, 83 N. Y. 100.) This action is in the nature of one for money had and received to the use of the plaintiff, and the remedy is barred in six years. (Code of Civ. Pro. § 382; *Brundage v. Vil. of Portchester*, 31 Hun, 129; *Parsons v. City of Rochester*, 43 id. 258.) This court is bound by the proof and findings as presented in the printed case. (*N. Y. Cable Co. v. Mayor, etc.*, 104 N. Y. 39.)

Matthew Hale for respondent. The money paid by respondent on this sale should have been applied first to the extinction of valid assessments upon the premises before payment of mortgages and interest. (*Eastman v. Pickersgill*, 55 N. Y. 316.) The fact admitted by the proper officer, that defendant got the benefit of the payment in the reduction of its bonded debt, raises an implied liability to repay plaintiff which can in no way be estopped. (*Horn v. New Lots*, 83 N. Y. 100.) There can be no doubt as to the validity of the town bonds issued under chapter 217, Laws of 1869, section 7. (*Horn v. New Lots*, 83 N. Y., 100, 105.) In the absence of proof, the presumption is that the judgment was in form prescribed by law, and that if there was any contrary direction it was for the defendant to show it. (Code of Civ. Pro. § 1679.) A defect in record evidence may be supplied on the argument of an appeal. (*Farmers' B'k v. Cowan*, 1 Abb. Ct. App. Dec. 88.) The defendant cannot avail itself here of the statute of

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limitations. (*Bommer v. Am. Spiral S. H. M. Co.*, 81 N. Y. 468, 470.)

RUGER, Ch. J. The complaint states the following facts as the foundation of the plaintiff's claim against the defendant, viz.: That the plaintiff purchased certain lands in the town of New Lots, described in the complaint, upon a foreclosure sale for the sum of \$7,600, and paid that sum, being the amount of his bid, to the referee appointed to make the sale; that said referee made the payments directed by the decree of foreclosure to be made from such purchase-money, and that there was a surplus arising from such sale over and above such payments of \$2,497.18, which was deposited by the referee with the county clerk of Kings county by order of the court; that on or about February 1, 1874, the collector of the town of New Lots received \$2,197.82 of such moneys from said clerk and applied it upon a warrant held by him for the collection of an assessment for grading Atlantic avenue, which was subsequently adjudged to be illegal and void; that such moneys were received by and applied to the uses of the town of New Lots. It then alleges "that \$1,499.93 of the said sum of \$2,197.82, so taken and received by the collector as aforesaid, *belonged to and was and still is the property of the plaintiff*, and was so taken and received without the knowledge or consent of the plaintiff and without any notice to him." The complaint concludes by avering "that the said defendant has wrongfully taken and received without the knowledge or consent of the plaintiff the aforesaid sum of \$1,499.93, *the property of the plaintiff*, and applied the same to its own use and has wholly failed and neglected to pay over the same to plaintiff on demand," and asks judgment for that sum.

The answer put in issue the allegation of the plaintiff's purchase of the property and his claim to the ownership of the sum of \$1,499.93, and the allegation that the assessment, upon which the amount received from the county clerk was applied, was void, *and admitted the other averments of the complaint*. The answer also set up the statute of limitations

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as a defense. It was conceded on the trial that the plaintiff was the purchaser of the premises for the sum of \$7,600 and the fact that the assessment for grading Atlantic avenue had been adjudged to be illegal and void was assumed without question. These admissions left the question as to the ownership of the surplus money, the only material issue of fact presented by the pleadings.

The facts that the referee had paid the amounts directed to be paid by the judgment-roll, and that the sum of \$2,497.18 constituted a surplus over and above such payments, were established by the admissions in the pleadings and could not, therefore, be made the subject of any controversy on the trial.

The defendant's counsel, after the evidence was substantially in, moved to dismiss the complaint on the ground that the surplus moneys did not belong to plaintiff. The court reserved its decision upon this motion, and after consideration of the whole evidence determined that the plaintiff's proof failed to make out a cause of action. It held that the complaint counted upon a cause of action to recover upon the ground of the plaintiff's title to the moneys in dispute, and that he had shown no title in or right to them, and ordered judgment for the defendant.

The plaintiff made no effort on the trial to amend his complaint, or to conform the pleadings to the proofs, or any claim or suggestion of a right to recover upon any cause of action except that presented by his complaint. Neither did he make any request for findings of fact, and none such were made by the court in addition to the facts referred to in the complaint, except that, subsequent to his purchase, the plaintiff paid to the comptroller of the state a valid assessment upon said premises for grading Atlantic avenue, amounting to \$1,000. No material exceptions were taken by the plaintiff until the close of the case, when he presented a general exception to each of the findings of fact and conclusions of law reached by the trial court.

The findings of fact were precisely in accordance with the allegations of the complaint, so far as that went, except in

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respect to the ownership of the surplus moneys which was found against the plaintiff's claim. There is no claim made now that the surplus moneys did belong to the plaintiff, and the finding that the plaintiff paid the comptroller \$1,000 upon a valid assessment, if it is entitled to any effect, was a favorable one to plaintiff and could not, therefore, be made the subject of a valid exception by him.

It is thus seen that the case contains but a single material exception taken by the plaintiff, and that is to the finding of law "that the defendant is entitled to judgment dismissing the plaintiff's complaint." The sole question presented by this exception is whether the proof sustained the plaintiff's claim as the owner of the surplus moneys. It was held in this court in a case, in all material respects similar to this, that such surplus moneys belonged to the mortgagor, or the owner of the equity of redemption, and it follows, therefore, that they could not belong to the purchaser at the mortgage sale. (*Horn v. Town of New Lots*, 83 N. Y., 100.)

The judgment of the trial court, therefore, covered all the issues in the case, was fully supported by the proof, and was not subject to any legal exception.

The General Term, however, upon appeal reversed the judgment and ordered a new trial. Its order of reversal does not state that it was made upon questions of fact, and it must, therefore, be assumed to have been made upon questions of law only, and upon familiar rules, must be sustained, if sustained it can be, by some valid exception taken upon the trial.

We have seen that there is no such exception in the case, and the judgment rendered by the trial court was, therefore, unassailable upon any legal ground. We might well close the discussion of the case at this point, but we deem it not unprofitable to refer briefly to the theory upon which the court below reversed the judgment of the trial court, as shown by the opinion of the majority of the court. That court seemed to be of the opinion that the evidence showed an equitable right on the part of the plaintiff to recover the sum claimed by

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him, and that the trial court erred in not giving him the benefit of such right, by its judgment.

The theory upon which this result is arrived at is that the decree of foreclosure, required all taxes and assessments on the premises foreclosed, to be paid out of the purchase-money, and that a valid assessment for \$1,499.93 thereon remained unpaid until November, 1883, when it was paid by the plaintiff, to the comptroller of the State to redeem his land from a sale thereof, made to enforce the collection of such assessment. The argument, in brief, was that the defendant by wrongfully receiving from the county clerk \$2,193.82 of the purchase-money realized on the sale of the premises, had taken possession of moneys which were devoted by the judgment in the foreclosure action to the payment of a valid assessment for \$1,499.93, and, therefore, became equitably liable, to avoid circuity of action, to repay to the plaintiff the sum which he had been obliged to advance to the comptroller to redeem his land. As we have seen, this cause of action was not presented by the pleadings, nor was it tried or determined by the trial court. The reversal seems to have proceeded upon questions neither presented by the pleadings, nor sustained by the proof, and in an action where the real party in interest was not represented in the litigation, or bound by the adjudication. (*McGregor v. Buell*, 3 Abb. Ct. App. Dec. 86.)

In arriving at the conclusion that there was a defect of parties in the cause of action discussed by the General Term, we have not omitted to consider the effect of sections 488, 498 and 499 as a waiver of such an objection. It was unnecessary in this case to raise such an objection by answer, as a party can be required to plead only to the causes of action stated in the complaint. If the complaint had been amended on the trial so as to embrace the cause of action upon which the judgment was reversed, the objection as to a defect of parties might be deemed to have been waived, if it had not been set up by answer; but as it is, such a claim is untenable. The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, "*secundum allegata et*

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probata," is fundamental in the administration of justice. (*Wright v. Delafield*, 25 N. Y. 266.)

Any substantial departure from this rule is sure to produce surprise, confusion and injustice, and this case presents no exception to such a result. To permit a recovery by the plaintiff in this action would still leave the defendant liable to an action by the true owner for the moneys illegally taken by it from the county clerk, and would compel the defendant to repay to the plaintiff the whole sum of \$1,499.93, while there are still moneys in the hands of the county clerk apparently applicable to the claim of the plaintiff, if it is maintainable at all. Even though the tax upon which the defendant claimed the right to take these moneys was void and uncollectible, it was still competent for the taxpayer voluntarily to pay it; and in such event the town would be entitled to hold the moneys received.

There is no evidence that the real owner of the surplus moneys has made any objection to the appropriation of them by the town, and no reason to suppose that he intends to contest its right to them, and as against all other persons it is, so far as can be discovered from this case, their right to retain them. The court below have gone outside of the case to discover facts upon which to support their theory, and have adjudicated upon a case not embraced in the pleadings, in the absence of the parties most interested in the disposition of the property involved, and upon assumptions not only unsupported by evidence but contrary to the admissions contained in the pleadings and the findings of the trial court. (*Comstock v. Ames*, 3 Keyes, 357.)

If it is true that the foreclosure judgment provided for the payment of liens and taxes which were not paid by the officer charged with that duty, it was essential to the proper adjudication of the questions involved, that the real parties in interest should have been brought into the litigation, and that the amount of such liens and taxes should be known, and what application of the purchase-money had been made, for the purpose of determining by whose fault the fund had been

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dissipated and misapplied, and the assessment, alleged to have been paid by the plaintiff, had been allowed to double in amount by delay through accumulations of interest and otherwise. From an examination of the facts stated in the respondent's brief, and the cases of *Easton v. Pickersgill* (55 N. Y. 316) and *People ex rel. Day v. Bergen* (6 Hun, 267), therein referred to, we are of the opinion that the material facts are very imperfectly presented by the printed case, but we are not at liberty to go outside of the record to discover facts upon which to base an adjudication. Those facts may, however, be referred to argumentatively, to show how dangerous it is for courts to adjudicate upon causes of action not stated in the pleadings, or tried in the court of original jurisdiction. From the information derived from the sources referred to we infer that the sum paid for the premises was nearly or quite sufficient to pay all liens and assessments, both valid and invalid, thereon if it had been promptly and properly applied. That it has not been so applied seems to have been mainly the fault of the purchaser of the premises, for he was most largely interested in the question, and had the power at all times, either by action or summary application to the court, to procure the appropriation of this fund to the payment of liens, and the relief of his property from incumbrance, and it is not a question free from doubt whether he has not lost his right to relief, if he had any, by his own laches.

We have been unable to discover any ground upon which the General Term was authorized to assume that the foreclosure judgment contained any provisions requiring the payment of taxes and assessments by the referee. The contents of a judgment-roll are like any other fact in the case to be proved and cannot be the subject of presumption. It was competent for the court rendering the judgment in the foreclosure action, to direct the land to be sold free of all liens, taxes and assessments thereon or subject thereto, or it might require them to be paid out of the proceeds of the sale, under such terms and conditions as it should prescribe, and these facts could only appear from an examination of such roll. The roll in question was neither

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set forth in the pleadings nor proved or produced on the trial, and it does not appear in the record of the case. We think, therefore, it was error in the court below to base a reversal of the judgment rendered by the trial court upon facts neither proved before nor found by it, and of which they could have had no legal information.

We infer from a statement in the brief of one of the counsel that a certified copy of such judgment-roll was produced on the argument before the General Term, and it is probable that their information of its contents, was derived from such copy. If such was the case, it was clearly error for that court to act on information thus obtained. While there are cases authorizing an appellate tribunal under certain circumstances to permit a record to be produced upon the argument in the appellate court, this is allowed only for the purpose of sustaining a judgment and is never permitted for the purpose of reversing one. (*Stillwell v. Carpenter*, 62 N. Y. 639; *Porter v. Waring*, 69 id. 250, 254.)

A further objection exists in the fact that such judgment-roll was inadmissible under the pleadings as it was not set forth or alleged the ein and was a material fact in the view taken by the General Term. The settled rule of appellate tribunals requires them, in reviewing judgments rendered upon a trial before a court or referee, to indulge all reasonable presumptions in support of the judgment of such tribunals, and to assume that they considered all of the evidence in the case and came to a conclusion adverse to the appealing party thereon, where it is necessary to support the judgment rendered. (*Hays v. Miller*, 70 N. Y. 112, 116; *Sheldon v. Sherman*, 62 id. 484.)

The court below seem to have reversed this rule and disregarded the findings and proofs, as well as the pleadings.

As we have before seen, the pleadings established uncontestedly the facts that all payments directed to be made by the judgment of foreclosure, had been made by the referee, and that the sum of \$2,497.18 was surplus over and beyond such payments, and the trial court found these facts in accord-

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ance with the allegations and admissions of the pleadings. These admissions and findings established conclusively the facts stated, and it was clearly error for the General Term to reverse the judgment entered thereon, upon the assumption that the referee in the foreclosure action did not make the payments which he was directed to make by the judgment, and that the sum of \$2,497.18, was not surplus moneys at all, but was a fund devoted by the judgment of foreclosure to the payment of the liens upon the premises. The plaintiff could not recover upon such a cause of action except by controverting the main allegations of his complaint, and showing the reverse of the facts alleged by him, and admitted by the answer. We have not been unmindful of the cases holding that when an action has been tried upon its merits without regard to the pleadings, and the evidence has been received therein without objection, the court should order such a judgment as the evidence calls for and justifies, but even in such a case the judgment rendered cannot be reversed unless the questions involved are presented by some legal exception.

This, however, is not such a case, for not only was the evidence insufficient to establish the equity supposed to have existed in favor of the plaintiff, but the parties tried the case presented by the pleadings, and no other, and demanded judgment upon the allegations of the complaint and requested no other judgment. The trial court was called upon to determine whether the cause of action set up in the complaint had been made out, and when it decided that it had not, they had acted upon and decided every question presented to it.

We have deemed it unnecessary to discuss the question of the effect of the statute of limitations upon the action, because the grounds before referred to are deemed a conclusive answer to the plaintiff's claim, but we must confess that it is difficult to see how a liability which was incurred by the defendant in 1874, if incurred at all, and for which it was then liable to some one, can remain unprosecuted for a period of upwards of nine years, without being barred by the statute.

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For the reasons stated we are of the opinion that the order of the General Term should be reversed, and the judgment of the trial court affirmed, with costs.

All concur.

Order reversed, and judgment affirmed.

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REUBEN H. FARNHAM, as Supervisor, etc., Appellant, v.
CHARLES H. BENEDICT, Respondent.

Under the general railroad act (chap. 140, Laws of 1850) the mere filing of articles of association does not constitute a corporation *de jure*. There must be a performance of the conditions precedent, *i. e.*, a stock subscription of at least \$1,000 for every mile of railroad proposed to be constructed, and a payment thereon of ten per cent in good faith and in cash.

Where, therefore, the subscriptions to the capital stock of a proposed railroad corporation were less than the amount required, and the subscribers paid no portion of their subscriptions in cash, but some of them gave their notes for ten per cent of their subscriptions and others gave checks; some upon banks in which they had no accounts or deposits, it being understood between them that the notes and checks were not to be collected but were to be returned, and three of their number, who were named as directors in the articles of association, made and annexed to said articles an affidavit as required by the act, to wit, that the amount of stock had been subscribed and ten per cent in good faith paid thereon in cash; which articles, with the affidavit, were filed in the office of the secretary of state. *Held*, that no corporation was in fact organized.

Under the town bonding act of 1869 (Chap. 907, Laws of 1869) the existence of a railroad corporation having power to issue stock or bonds, and to construct the road to be aided, lies at the foundation of the power to issue the municipal bonds.

Accordingly, *held*, that bonds of a town, issued for the stock of a pretended corporation fraudulently organized as above stated, were invalid save in the hands of *bona fide* holders.

The articles of association were filed in 1870; no movement was made to begin the construction of the road within five years thereafter as required by the act of 1867 (Chap. 775, Laws of 1867). *Held*, that, assuming the organization had a legal existence as a corporation, and that the bonds were lawfully issued and delivered to it, the default in beginning the construction caused its corporate powers to cease and terminate, and deprived the stock issued to the town of any value,

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and, therefore, that as the consideration for the bonds had failed they were void except in the hands of *bona fide* holders.

Also, *held*, that an action was maintainable on behalf of the town, by its supervisor, to recover damages against one of the persons who made the false affidavit, and, who, with full knowledge of the fraud, had instigated, and as attorney conducted, the proceedings for bonding the town, and, having, in the character of an officer of the pretended corporation, obtained possession of the town bonds, after the five years had expired for beginning the construction of the road, had sold the bonds to *bona fide* holders, who purchased in reliance upon the representations of defendant, that the bonds were good and valid securities, and thus had rendered the town liable thereon.

It seems, the fact that the persons signing the petition for bonding the town were well acquainted with the facts relating to the organization of the pretended corporation, would not affect defendant's liability in such an action; as, by procuring the town to be bonded, the petitioners not only imposed a burden on their own property, but on that of other taxpayers who did not sign or approve of the scheme, and who were at liberty to contest the validity of the bonds, until by defendant's action the town lost the right to avail itself of this defense.

Also, *held*, that the act of 1875 (Chap. 598, Laws of 1875), passed after the forfeiture and before the negotiation of the bonds by defendant, did not cure the forfeiture; that the act only applies to a default in failing to complete the road within ten years.

Also, *held*, the fact that defendant accounted to the pretended company for the proceeds of the bonds was not a defense.

It seems, that immediately on the negotiation of the bonds a cause of action accrued in favor of the town, either in the nature of an action of trover for the face of the bonds, or as for money had and received, for the money realized by him on the sale.

Also, *held*, that defendant's liability was not affected by an act passed in 1880 (Chap. 577, Laws of 1880), purporting to release the company from the forfeiture of its charter by reason of its failure to begin the construction of the road within five years; that the said act did not have the retroactive effect to take away a right of action which accrued in 1875.

It seems, the act last mentioned is violative of the constitutional provision (State Const. art. 8, § 18), prohibiting the legislature from passing any local or private act granting to any corporation or association the right to lay down railroad tracks.

Farnham v. Benedict (39 Hun, 22) reversed.

(Argued March 9, 1887; decided October 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

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made January 5, 1886, which affirmed a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 39 Hun, 22.)

This action was brought by plaintiff, as supervisor of the town of Attica, in the county of Wyoming, to recover damages alleged to have been sustained by said town by reason of certain fraudulent and unlawful acts on the part of the defendant, set forth in the complaint, the substance of which, as well as the facts as found, are stated in the opinion.

L. W. Thayer for appellant. The defendant was personally liable to the town for the damages arising from the sale of the bonds. (*Comstock v. Hill*, 73 N. Y. 268; *Thayer v. Manley*, id. 305; *Town of Ontario v. Hill*, 99 id. 324; *Decker v. Matthews*, 12 id. 313.) Whoever does an injury to another is liable in damages to the extent of that injury, whether it is to his property, person, rights or reputation. (*Dexter v. Spear*, Mason, 115; Sedgw. on Meas. of Dam. 22; *Hynes v. Patterson*, 95 N. Y. 1.) The false affidavit was not only a crime but a fraud upon the people, the town and the Secretary of State; and no valid town bonds could be issued to aid in the construction of the road. (*Ex. Grain B. Co. v. Stayner*, 25 Hun, 91; *Durant v. Abendroth*, 69 N. Y. 152; *Mid. R. R. Co. v. Van Horn*, 57 id. 474; *In re Syr. Che. & N. Y. R. R. Co.*, 91 N. Y. 1; *Beach v. Smith*, 30 id. 116; *B. R. & U. R. R. Co. v. Clark*, 25 id. 208; *O. R. & C. R. R. Co. v. Frost & Spriggs*, 21 Barb. 541; *L. O., etc., R. Co. v. Mason*, 16 N. Y. 457; Laws of 1871, chap. 925; *Barnes v. Brown*, 80 N. Y. 527.) It required no adjudication to end the existence of the company. (*In re B. W. & N. R. R. Co.*, 72 N. Y. 248.) The sale of the bonds by the defendant, at their par value, to Fisher, Pickard & Gardner, who were *bona fide* purchasers for value, rendered the town liable to pay them in full. (*Comstock v. Hier*, 73 N. Y. 269; *Murray v. Burling*, 10 John. 180; *Decker v. Matthews*, 12 N. Y. 313-319; *Thayer v. Manley*, 73 id. 305; *Ontario v. Hill*, 33 Hun, 250.) In case the company had been legally organ-

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ized on the 28th day of February, 1870, it ceased to be such on and after the 27th day of February, 1875. (*In re B. W. & N. R. R. Co.*, 72 N. Y. 245; Laws of 1867, chap. 775, § 1.) Chapter 577, Laws of 1880, simply relieved the company from the forfeiture of its charter by reason of its failure to expend the ten per cent in five years, or the completion of the road in ten years, which had then expired. (Const. § 18, art. 3; *In re B. W. & N. R. R. Co.*, 72 N. Y. 245; 75 id. 335.)

W. F. Cogswell, for respondent. The payment of the ten per cent was not necessary to complete the organization. (*O. R. & C. R. R. Co. v. Frost*, 21 Barb., 541; *L. O. R. R. Co. v. Mason*, 16 N. Y. 451; *Beach v. Smith*, 30 id. 116.) The consequences of the company's neglect to enter upon the construction of its road within five years from the filing of its articles were cured by chapter 598 of the Laws of 1875 by which it is provided that an omission of any road to construct its railroad within the period of five years shall not cause a forfeiture of its corporate powers. (Laws of 1875, p. 730; *In re B. W. & N. R. R. Co.*, 72 N. Y. 245, 250.)

RAPALLO, J. This case comes up on the findings of the referee. The evidence is not contained in the case.

The cause of action claimed on the part of the plaintiff to have been established by the facts found, is, in substance, that in the month of September, 1875, the defendant having in his possession, without title, certain bonds of the town of Attica, which purported to have been issued pursuant to the town bonding acts, to aid in the construction of a proposed railroad pretended to have been incorporated under the name of the Attica and Arcade Railroad Company, sold and delivered such bonds to certain persons who purchased them in good faith, and paid to the defendant the full par value thereof in money, upon his assurance and believing that they were in all respects lawful and valid, and a legal indebtedness of the town of Attica. That until the bonds were then placed by the defendant in the hands of *bona fide* holders they were

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absolutely void, and did not constitute any indebtedness, and could not have been enforced against said town, but that by transferring them to *bona fide* holders for value he rendered them valid and binding upon the town, and enabled such holders to recover judgments thereon against the town, which, in an action brought by one of such bond holders, it was decided by the Circuit Court of the United States that they could do, and that the town was thus obliged to pay and did pay the full amount of said bonds to such *bona fide* holders. That at the time of so negotiating said bonds and receiving the proceeds the defendant knew the facts which rendered the bonds void, except in the hands of *bona fide* holders, and knew that they could not have been enforced by him, or the railroad company, or any other person until he thus placed them in the hands of *bona fide* holders. That he had been actively instrumental in the organization of the pretended railroad company, and knew it to be a sham organization, formed without compliance with the requirements of the general railroad law, and gotten up fraudulently for the purpose of being used to initiate proceedings for the issue of town bonds, such organization having been based upon a false affidavit knowingly made by the defendant. That he had instigated, and, as an attorney of the Supreme Court, had conducted the subsequent proceedings for bonding the town, and had obtained possession of the bonds from the railroad commissioners in the character of vice-president of the pretended railroad corporation, and had sold them to *bona fide* holders and received the proceeds, on his assurance that they were valid securities and had thus rendered the town liable thereon.

The grounds upon which the bonds are claimed to have been void, except in the hands of *bona fide* holders, are, *first*, that the pretended organization of the Attica and Arcade Railroad Company was fraudulent and void; *secondly*, that even if the company had ever been legally organized its corporate existence had ceased before the sale by him of the bonds, and the stock of said corporation, which had been issued to the town as the consideration for the bonds, had thus become

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absolutely worthless, and the consideration had thus wholly failed.

The facts relating to the pretended organization of the railroad company are found by the referee to have been as follows: On the 24th of February, 1870, the defendant and other citizens of the county of Wyoming met and subscribed written articles of association, stating that in pursuance of the general railroad law of 1850, they formed a company for constructing and operating a railroad from the village of Attica to the village of Arcade, in Wyoming county, to be named the "Attica and Arcade Railroad Company." That the length of the road, as near as could be stated, was to be twenty-five miles, and the capital stock \$250,000, to be divided into 2,500 shares of \$100 each. The articles then set out the names of the defendant and twelve other persons as the directors for the first year. At the same time the defendant and others subscribed for 241 shares of stock amounting to \$24,100, and thereupon the defendant and two others of those named as directors, made and swore to the affidavit required by the second section of the general railroad act, viz.: that the amount of stock required by said second section had been subscribed and ten per cent in good faith paid thereon in cash to the directors named in the articles. The articles of association, with such affidavits annexed, were filed in the office of the Secretary of State, on the 28th of February, 1870.

The affidavit was false in every particular. The act required that before the articles should be filed at least \$1,000 of stock for every mile of railroad proposed to be made should be subscribed, and ten per cent paid thereon, in good faith and in cash, to the directors named in the articles, and that an affidavit of these facts should be indorsed on or annexed to the articles; whereas in point of fact, at the time the affidavit was sworn to only \$24,100 of stock had been subscribed, the length of the proposed road being twenty-five miles, and no part of the amount subscribed had been paid in cash, or ever has been paid.

The referee also finds that the falsity of the affidavit was well known to the defendant at the time he swore to it; that

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the pretended payments were made by the delivery to a person named as treasurer of said company of the checks, and, in two or more instances, the promissory notes of the subscribers for ten per cent of their subscriptions; that at the time the said checks and promissory notes were so given and received in payment of said ten per cent, it was publicly stated that they could be used, and was so stated by the defendant; that the larger proportion of persons who gave such checks had no account or funds at the bankers upon whom the checks were drawn, and gave the checks with the understanding that the same were not to be presented for payment, or paid; that they have not been paid, nor anything realized thereon by the company, and that none of the subscribers to the said articles of association have ever paid anything upon their subscriptions for stock.

At the request of the plaintiff the referee also found that the defendant attended the meeting at which the articles of association were signed and took a leading part in conducting the same and in procuring subscriptions for stock and was cognizant of the proceedings to organize said company and advised as to the requirements of law to effect such organization and advised that the ten per cent required by law to be paid in cash could be paid in checks; that at the time said articles of association were signed and subscriptions made, it was not intended by the defendant and others controlling said meeting and procuring said subscriptions, that the sums subscribed should be paid, but it was intended and expected, and so publicly stated by the defendant, that after the articles should be filed in the office of the secretary of state, proceedings would be taken by the taxpayers of the towns through which the railroad was to be constructed, to bond those several towns to raise the necessary amount of money to construct the road, and that after the filing of the articles on the 28th of February, 1870, and before any contract had been made for the construction of the proposed railroad, the defendant, then being vice-president and acting president of said pretended corporation, and well knowing the facts before stated, procured

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petitions to be signed by taxpayers of the town of Attica to be presented to the Supreme Court with his name indorsed thereon as attorney for the petitioners, and caused such petition to be presented to said court, and controlled said proceedings which resulted in the bonding of the town, and that he testified before the referee appointed therein, among other things, that the said company had been regularly organized and officers and directors elected, and that he procured two persons named to be appointed railroad commissioners of said town. That he afterwards, about September 1, 1875, sold \$6,600 of said bonds to *bona fide* purchasers at par and interest accrued, and received the money therefor, but the referee found that such sale was made for the company, and that the defendant accounted to the company therefor. He also found that said purchasers bought said bonds in good faith and upon the assurance of the defendant that they were good and valid debts against said town and were legal and valid securities.

The second ground upon which it is claimed that the bonds had become voidable after their issue and before their sale, is that, as found by the referee, the pretended railroad corporation did not, within five years after its articles of association were filed and recorded in the office of the Secretary of State, begin the construction of its road, or expend thereon ten per cent of its capital.

It appears from the findings that the articles were filed and recorded February 28, 1870. The proceedings for bonding the town were instituted under chapter 907, of the Laws of 1869. The petition, signed by a majority of the taxpayers, was dated June 9, 1873, the defendant appearing as attorney for the petitioners. A referee was appointed August 12, 1873, and judgment entered October 29, 1873, appointing three commissioners with power to execute bonds of the town of Attica, to the amount of \$20,000, and invest the same or the proceeds in the stock of the Attica and Arcade Railroad Company. By virtue of that judgment the commissioners, in March, 1874, made and delivered to the Attica and Arcade Railroad Company town bonds to the amount of \$20,000 in

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payment of their subscription in behalf of the town for 220 shares of the stock of the company.

Assuming these bonds to have been legally issued in the first instance, it is claimed that they ceased to be valid in the hands of the company or its officers, on the 28th of February, 1875, by reason of the termination of the corporate existence of the company. Yet they were not sold by the defendant until about September 1, 1875, at which time they were transferred by him to *bona fide* holders, and the town thus made liable thereon, as was decided by the United States Circuit Court.

The question of the validity of the bonds at the time they were issued, in the hands of any but a *bona fide* holder, will first be considered.

The general railroad act requires as a condition precedent to the formation of a railroad corporation, that at least \$1,000 for every mile of railroad proposed to be constructed shall be subscribed and ten per cent paid thereon in good faith and in cash, and provides in terms that the articles of association shall not be filed and recorded until those conditions have been complied with, nor until the affidavit required has been annexed to the articles, and that *on compliance with those conditions* the subscribers and all persons who shall become stockholders shall be a corporation. It cannot be questioned that in the absence of such compliance the mere filing of articles of association would not constitute a corporation *de jure*, nor can it be doubted that the proceedings by which the company purported to organize as a corporation were a gross fraud upon the railroad act and would be adjudged void in any proceeding in which they came directly in question. Neither can it be disputed upon the facts found that the defendant was a party to such fraud. The bonding act of 1869 (Laws of 1869, chap. 907), under which the bonds in question purport to have been issued, is entitled "An act to amend an act to authorize the formation of railroad corporations and to regulate the same, passed April 2, 1850, so as to permit municipal corporations to aid in the

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construction of railroads," and provides for creating bonds and investing the same or the proceeds thereof, in the stock or bonds of such railroad company in this State as may be named in the petition of a majority of the taxpayers. The existence of a railroad corporation having power to issue stock or bonds to be given to the municipal corporation, and to construct the road to be aided, therefore lies at the foundation of the power to issue municipal bonds. It cannot be pretended that authority could be obtained under that act to issue town bonds to any unincorporated set of individuals who should undertake to style themselves a railroad company, nor that the mere filing of pretended articles of association in the office of the secretary of State without compliance with any of the other requirements of the general railroad law, would constitute those whose names were attached to such articles a corporation. Articles filed, with an intentionally false affidavit of such compliance, would have no more actual validity than if the names of the subscribers had been forged.

The learned referee in his opinion says that, so far as the case shows, the petitioners here were as well acquainted with the facts relating to the organization of the Attica and Arcade Railroad Company, and its financial condition at the time they signed the petition, as the defendant; and that, so far as any claim for damages against the defendant in this action is concerned, unless some fraudulent act of the defendant induced the petitioners to sign, the defendant would not be liable any more than if he had asked an individual to subscribe for the stock; and that mere knowledge of the fact that the company had not been legally organized, unaccompanied by any fraudulent representation, would not be sufficient, although he concedes that if a town or an individual should be induced by false or fraudulent representations to subscribe for stock and part with his or its money, an action would undoubtedly lie for the fraud, but that such was not the case here. It seems to me that the reasoning of the learned referee is fallacious. In the first place there is nothing to show that the taxpayers who signed the petition to bond

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the town had any knowledge of the fraudulent character of the pretended organization, or of the falsity of the affidavit annexed to the articles of association, and no such fact is found; nor is there anything but mere surmise to lead to the conclusion that they had such knowledge. All that appears is, that to the articles of association, publicly filed and referred to in the petition, was attached the affidavit of the defendant and two other persons; and all that the petitioners could be presumed to have known is that the law required such an affidavit. But supposing that the petitioners had known that the affidavit was false, that knowledge would not be material to this case. By procuring the town to be bonded the petitioners imposed a burden not merely on their own property, but also on that of the taxpayers who did not sign the petition or approve the scheme, and who were at liberty to contest the validity of the bonds, until the defendant, by wrongfully transferring them to *bona fide* holders, with knowledge of their actual invalidity, and on his assurance to the purchasers that they were valid securities, deprived the town, and the taxpayers who had not consented to the bonding, of the power to avail themselves of the defense, according to the doctrine held by the United States courts in respect to *bona fide* holders of town bonds. It was for that wrong that this action was brought.

I think that if the holders of the bonds had not been furnished by the acts of the defendant with the shield which has thus been thrown around *bona fide* holders of town bonds, the town would have had a good defense to the bonds in any court on both of the grounds now taken by the counsel for the plaintiff. The pretended railroad corporation was a mere sham, apparently gotten up for the express purpose of obtaining an issue of town bonds without putting up the cash, which the statute required as a guaranty of the *bona fides* of the proposed undertaking, and as a security to those dealing with or lending their credit to the corporation to be formed; and it is inconceivable that any court of justice would allow bonds obtained by such a fraud to be enforced against the

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town by the very persons composing this fraudulent organization, and who had paid no value for the bonds.

I think that the second ground upon which the bonds are claimed to have become invalid before they were negotiated by the defendant is also well taken.

Assuming that the Attica and Arcade Railroad Company ever had legal existence as a corporation, and that the bonds were lawfully issued and delivered to it, still they were issued for the purpose of aiding in the construction of the proposed railroad, and in consideration of stock of the company issued to the town in payment for the bonds. The company instead of using the bonds to aid in the construction of the road, and thus giving value to the stock which it had issued to the town in payment, laid by for years after the bonds were issued and did not begin the construction of the road within the five years prescribed by the statute, and by this default caused its corporate powers and franchises to cease and terminate, thus losing the power to construct the road or to acquire the right of way, and depriving the stock which it had issued to the town of any value.

The act of 1867 (Chap. 775) provides that if any corporation formed under the general railroad law of 1850, shall not within five years after its articles of association are filed and recorded in the office of the Secretary of State, begin the construction of its road and expend thereon ten per cent on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association as aforesaid, its corporate existence and powers shall cease.

It was decided by this court in the *Matter of the B. W. & N. R. Co.* (72 N. Y., 245), that these provisions of the statute executed themselves, and that when a company omitted to begin the construction and expend the prescribed ten per cent of its capital within the five years, it ceased to exist and became extinct without any judicial procedure to declare or complete the forfeiture of its corporate powers; that the legal existence of a corporation authorized to construct a railroad

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lay at the foundation of the right to take property for its use (as I contend it lies at the foundation of the power of a town to issue bonds to aid in the construction of a railroad) and that any person whose lands were sought to be appropriated to the use of a railroad company, could assert this extinction of its corporate rights.

It is claimed in the respondent's brief that the act of 1875 (Laws of 1875, chap. 598) passed June 18, 1875 (after the forfeiture and before the negotiation of the bonds by the defendant) cured this forfeiture, but it is very clear that that act has no application to this case. The act of 1867 declared two defaults, either of which would terminate the existence of the company: (1st.) The failure to begin the construction and expend ten per cent of the capital within five years; and (2d), the failure to complete the construction within ten years. It was only to the second default that the act of 1875 applied. It relieved companies that for any cause had been unable to construct their road within the time limited, by providing that the time for the *completion* of the road should be extended for a further term of two years beyond the time theretofore limited, and that failure theretofore to construct the road should not cause a forfeiture of the corporate powers. Corporations that had been unable to complete their roads stood on a very different footing from those that had omitted for five years even to begin the construction. These were not either within the letter or the equity of the act, and it is evident that those whose rights had become extinct by reason of their omission to *begin* the construction were not intended to be resurrected, as the concluding sentence of the act declares that nothing therein contained shall have the effect to revive any corporation whose corporate power has been forfeited for any cause.

It thus appears that in September, 1875, when the defendant transferred the bonds to *bona fide* holders, assuring them that they were valid obligations, the pretended corporation, if it had ever had any existence, had become extinct; the stock which had been issued to the town had become worthless; the

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company had lost all power to construct the road, and the purpose for which the bonds had been issued had wholly failed. Who can contend that under these circumstances the bonds in the hands of the sham and defunct corporation, or of those who had been its pretended officers, could have been enforced against the town.

I think the conclusion is irresistible that in the hands of the defendant, or of the fraudulent and defunct organization for which he claims to have been acting, the town had a valid defense to the bonds; that the defendant well knew this, and all the facts, and could have been restrained by injunction from transferring the bonds to *bona fide* holders, and could have been compelled to surrender the bonds to the town. No such injunction, however, was obtained, nor does it appear that the town or the taxpayers, had any cause to apprehend that the defendant would so transfer the bonds. He made the transfer to *bona fide* purchasers and received the proceeds, and the town was by this act, according to the decision of the United States Circuit Court, and the law as declared by the federal courts, made liable to pay the bonds, and was compelled to pay them, and the question now before us is whether the town has any redress against the defendant. It seems to us that on the principles enunciated in *Comstock v. Hier* (73 N. Y. 269 and cases there cited), the facts found do show a liability on the part of the defendant to the town.

In *Comstock v. Hier* it appears that the plaintiff had indorsed a promissory note made by the firm of Jaycox & Green, payable to the order of the plaintiff, for the accommodation of the makers, and under an agreement between the plaintiff and the makers that it should be used only for the purpose of taking up a prior note indorsed in like manner; but the makers, instead of using the note as agreed, transferred it to the defendants as collateral security for an antecedent debt, the defendants parting with no value on receipt thereof. The defendants transferred the note before maturity to a *bona fide* holder for value, and thus deprived the plaintiff of the defense which he would otherwise have had to an action on his indorsement. The holder

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accordingly recovered judgment against the plaintiff as indorser, which judgment the plaintiff paid and then brought his action against the defendants. The makers had become bankrupt. This court decided that the plaintiff was entitled to maintain the action. Several propositions were adjudged: 1st. That on these facts the plaintiff would have had a perfect defense to an action by the present defendants against him as indorsee of the note, it having been diverted from the purpose for which the indorsement had been made, and they not being *bona fide* holders for value. 2d. That the defendants had no better title to the note and indorsement than Jaycox & Green had, and that the plaintiff could have reclaimed it and in equity prevented its negotiation. 3d. That the defendants had no right to secure to themselves the full benefit of the defendant's indorsement, and all the advantages of *bona fide* indorsees for value, by negotiating the note to an innocent transferee for value before maturity. 4th. That having no legal title, as against the plaintiff, to the note and indorsement, they had no right to transfer it, and the sale of it by them was a conversion; that the defendants could not fortify their title by a sale of the note, and the title to the proceeds was the same as to the property before the sale. 5th. That the plaintiff was the actual owner of the note, it never having been lawfully transferred and the defendants could not have resisted an action by the plaintiff for its surrender to him; that he had an election of remedies, trover for the conversion of the note or an action for money had and received for the proceeds of the discount, and that the complaint contained the necessary averments to sustain an action in either form.

On these grounds a decision in favor of the defendants rendered by the Supreme Court was reversed. That case seems to me decisive of the present one. At the time the defendant sold the bonds (September, 1875) the actual title to them was not in the so-called railroad company nor in the defendant. The so called company had never acquired the legal power to receive or hold them; but if it had ever acquired such power it had become extinct by the termination

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of its alleged corporate existence, and of its power to use them for the purpose for which they had been made. The town was under no legal obligation to pay them while they were in the hands of the defendant, but might be subjected to such a liability by their being transferred to a *bona fide* holder for value, and could, therefore, have enjoined their negotiation by the defendant and compelled their surrender. In this respect the case is also similar to that of *Thayer v. Manley* (73 N. Y. 305) and *Decker v. Mathews* (12 id. 313). In the last named case the plaintiff had made his own note, payable to the order of J. and indorsed by him. The note was made and indorsed for the accommodation of J. & Co., and for the purpose of being discounted by them at the Manhattan Bank and the proceeds applied to the payment of other notes previously made and indorsed by the same parties. The bank refused the discount, and the purpose for which the note had been made thus failed, and J. & Co. put it in their safe from which it was taken by the defendant Mathews, and by him discounted at another bank without the consent of any of the parties. It was held that the plaintiff was entitled to recover against Mathews; that the note was of no value when Mathews took it from the safe, but by the act of passing it to a *bona fide* holder it became valuable and the plaintiff became liable to pay it, and his cause of action accrued immediately upon his becoming liable upon the note and before payment, and that he was entitled to recover against Mathews the face of the note for which he had thus been made liable.

So in the present case the bonds were of no value in the hands either of the pretended company or of the defendant; and immediately upon their being negotiated by the defendant a cause of action accrued against him, either in the nature of an action of trover for the face of the bonds, or, as held in *Hier v. Comstock*, for money had and received for the amount realized from the sale, he having obtained the money on the liability of the town thus created by him. I can see no way of avoiding this conclusion without overruling the two cases last cited. Whether anything transpired after the

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sale of the bonds to relieve the defendant from the liability he had thus fixed upon himself will now be considered.

The learned referee finds that the defendant accounted to the alleged railroad company for the proceeds of the bonds. It is not even found, nor does it appear, that he paid over the proceeds, or expended them for the use of the pretended company, but simply that he accounted, which may mean that he rendered an account acknowledging the receipt, but may have still retained the fund or applied it to his own use. But suppose he had actually paid over the proceeds of the bonds to some person as the representative of the pretended corporation, the case would not be changed. In the first place there never was such a corporation, but only a combination of persons organized for the very purpose of subjecting the town to this liability; and he was a leading member of this combination, and the party through whose perjury it had attempted to clothe itself with the character of a corporation; and if he had handed over the proceeds to one of his associates in that combination, he could not thereby have discharged himself. Secondly. If the fraud in the organization could be held to have been so far successful as to clothe this combination with corporate powers, those powers had become extinct by the terms of the statute, before the defendant sold the bonds and received the proceeds; and the town itself had no power to advance money to it and create a charge upon the taxpayers, or to make itself liable for advances made to it by others.

The main reliance of the learned referee, outside of his conclusion that the defendant was not liable, on the ground of fraud, for the part taken by him in organizing the pretended company and procuring the issue of the town bonds, was upon chapter 577 of the Laws of 1880, passed June 22, 1880, which, in his opinion, conferred upon the Attica and Arcade Railroad Company a valid title to the bonds, and the legal right to enforce them, so far as the validity of that organization could confer that right, and cured all defects in that organization; and also relieved the company of all for-

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feitures by reason of its failure to comply with the requirements of law relating to the construction of railroads by companies formed under the general act.

If I am right in the conclusion that in September, 1875, a right of action had accrued in favor of the town, against the defendant, for the proceeds then received by him on the sale of the bonds to *bona fide* holders, it is difficult to see how that right of action could be taken away by an act of the legislature passed in 1880, especially when the act cited, even if constitutional in other respects, does not purport, even, to have that retroactive effect.

Section 1 of that act purports to release the Attica and Arcade Railroad Company from the forfeiture of its charter by reason of its failure to begin the construction of its road and expend thereon ten per cent of its capital within five years after the articles of association were filed and recorded in the office of the Secretary of State, and also by reason of its failure to finish said road and put it in operation within ten years from the time of its so filing and recording its articles of association. Section 2 declares that said company shall possess all the powers and rights it would have possessed in case all its acts and proceedings had been in conformity with the provisions of the general railroad act of 1850, and the acts amending the same, and section 3 authorizes said company to construct its road with a three-foot gauge. It contains no provision purporting to legalize any town bonds previously issued in aid of the construction of the road, nor discharging any person from any liability incurred in connection with any such bonds. It speaks wholly in respect to the future and purports only to vest the company with the powers which it would have had if it had been duly incorporated and had not forfeited its charter, and legalizes none of its past acts. But this statute is clearly violative of section 18, article 3 of the constitution, which took effect January 1, 1875, and prohibits the legislature passing any local or private bill granting to any corporation, association or individual the right to lay down railroad tracks. In one point of view the

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company had never had any previous legal existence, not having complied with the provisions of the general railroad law for its organization. But passing this point and assuming that it had had such existence, such corporate existence had become extinct by the expiration of the limitation contained in section 47 of the general act as amended by chapter 575 of the Laws of 1867. It had been extinct for more than five years before the passage of the act of 1880, and that act was an attempt to create a new corporation under the guise of reviving and rehabilitating a defunct corporate body. It was therefore void and inoperative for any purpose. This precise point was expressly adjudicated in *Matter of B. W. & N. R. Co.* (75 N. Y. 335, 339).

The court at General Term, in reviewing the decision of the referee, do not undertake to sustain by any reasoning his ruling that the bonds were valid, but assuming that they were void while in the hands of the company, and that the stock for which they were exchanged was worthless, and that the bonds were therefore without consideration, and that the commissioners might have been restrained from disposing of them, and also that, after their issue, the company and the defendant as its officer and agent might have been restrained from negotiating them, yet holds that the defendant, having received them as the president of the company, for its use, and having sold them for the company at par for cash, and accounted to the company therefor, the only authority he had over the bonds and the only duty he was under in respect to them was as the officer or agent of the company, and there was no ground upon which he was responsible to the town for his agency in selling the bonds after they had been delivered to the company by the commissioners.

This position has been, in my judgment, already answered by the cases referred to. In the case of *Comstock v. Hier*, the defendants received the note indorsed by the plaintiff, not from him but from the payees, and it could have been said that they owed no duty to the plaintiff in respect thereto. In that case it did not even appear that the defendants knew of

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any infirmity in the note or indorsement, or that in transferring it to a *bona fide* holder they were doing any wrong to the plaintiff, or imposing any liability upon him which he had not already incurred, yet it was held that, as by such transfer they subjected the defendant to liability, they were responsible to him for the proceeds of the transfer or for the amount for which they had subjected the defendant to liability. In that respect the present case is stronger against the defendant than *Comstock v. Hier*, for here he had full knowledge that the town was not liable upon the bonds and that by negotiating them he rendered it liable and deprived it of its defenses. But the other facts in the case also preclude his assuming the position of an innocent agent dealing for a responsible principal on whom the liability should rest. In fact he had no principal. There was no existing corporation that could be held responsible for his acts. His assumed principal was a mere combination of individuals who, by his own fraudulent acts, had clothed themselves with the name of a corporation, and even this pretended body had become extinct before the sale. If the defendant was not liable no one was. In such a case a party cannot claim protection under any principle of the law of agency.

All the facts of the case considered together show that the sale of these bonds, which was the act which created a liability on the part of the town, was but the consummation of the fraudulent scheme to bond the town without putting up the money required for the legal organization of a railroad corporation, to which scheme the defendant was, at least, a party, if not the prime mover in it.

I have discussed every point made, either in the opinions of the referee or of the court or in the brief of counsel, in support of the defense. In my judgment none of these points are tenable and the dismissal of the complaint cannot be sustained.

At the conclusion of the findings of the referee, there is a finding that after the transactions hereinbefore detailed and in the year 1880, a company was organized under the name of the

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Tonawanda Valley Railroad Company, and that the Attica and Arcade Railroad Company transferred its assets and franchises to that company, and that in the same year the majority of the railroad commissioners of the town of Attica exchanged \$11,800 of new bonds of the town of Attica for that amount of bonds made and delivered to the Attica and Arcade Railroad Company and also received for the said town of Attica \$20,000 of the stock of the Tonawanda Valley Railroad Company. The precise bearing of these facts does not appear, the testimony not being contained in the case, and the finding not having been explained in the brief of counsel, but it has been suggested that in some way the town of Attica by these transactions may have saved itself in whole or in part from the loss sustained by the acts of the defendant. If on a new trial it should be made to appear that the loss of the town has been reduced in any such way, the defendant should have the benefit of such reduction in mitigation of the damages for which he is liable.

The judgment entered upon the report of the referee, and the affirmance of that judgment by the General Term should be reversed, and a new trial ordered, with costs to abide the event.

EARL, DANFORTH, and PECKHAM, JJ., concur; RUGER, Ch. J., ANDREWS and FINCH, JJ., do not vote.

Judgment reversed.

Theresa Lynch, Respondent, v. The First National Bank
of Jersey City, Appellant.

107	179
118	367
107	179
124	331

One W. delivered to plaintiff in payment for property purchased of him, a check drawn upon defendant, signed by W. and payable to himself or order. This check defendant certified at the request of the drawer and while it was still in his possession, he at that time having funds in the bank. It was not indorsed by W. Payment of it was refused. In an action to recover the amount of the check *held*, that defendant was not liable; that the action could be supported only by proof that all of the conditions upon which the authority of the bank to pay the check

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was made to depend had been performed; that one of these conditions was W's indorsement thereon.

It seems that the certification of a check is in effect an acceptance; it amounts to a representation that the drawer has funds in the bank with which to pay the check and that it will retain and pay them to the holder; but, if the holder is the drawer, the contract between them is that the bank will pay only in accordance with the terms of the check and subject to the conditions written therein by the drawer.

Freund v. I. & T. Nat. Bank (76 N. Y. 353, 357), and *Risley v. P. Bank* (88 N. Y. 818) distinguished.

(Submitted June 20, 1887; decided October 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 29, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict.

This action was upon a check drawn upon and certified by defendant.

The material facts are stated in the opinion.

Hamilton Wallis for appellant. The appellant was under no legal obligation to recognize the alleged ownership of the respondent, or to pay the amount of the check, except upon the order of the drawer, evidenced by his indorsement upon it. (*Willeys v. Phoenix Bank*, 2 Duer, 121; *Edw. on Bills and Notes*, 405, 406; *Byles on Bills*, 62, 147; *Rand. on Com. Paper*, § 5; *Cowperthwaite v. Sheffield*, 3 N. Y. 251.) A general custom not contrary to any statute may be proved, and all parties are presumed to act in view of it. It becomes a part of every contract made within its scope. (*Walls v. Bailey*, 49 N. Y. 464.)

Abram Kling for respondent. The check drawn by the maker, F. F. Wilder, to his own order and not indorsed, had the same effect and was negotiable in like manner as if made payable to bearer. (*Willeys v. Phoenix Bank*, 2 Duer, 121; *Risley v. Phoenix Nat. Bank*, 83 N. Y. 318; *Central Bank v. Lang*, 1 Bosw. 202; *Evertson v. Nat. Bank*, 66

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N. Y. 14.) The delivery of the certified check by the maker to the plaintiff for a valuable consideration operated as an assignment *pro tanto* of the funds in the hands of the defendant to the payment of the check, and the defendant by its certification became liable therefor. (*Freund v. Imp. and T. B'k*, 76 N. Y. 352; *Risley v. Phœnix Nat. Bank*, 83 id. 318; *Brill v. Tuttle*, 81 id. 454; *Cooke v. State Nat. Bank*, 52 id. 96; *Willets v. Phœnix Bank*, 2 Duer, 121.) The defendant, by its certification of the check, represented that it had funds of the drawer in its hands sufficient to meet the check, and engaged that those funds should not be withdrawn from it by the maker; upon the transfer of the check to the plaintiff by the owner of the fund the obligation of the defendant was established. (*Clews v. Bank of N. Y.*, 89 N. Y. 418; *Cooke v. State Nat. Bank*, 52 id. 96.)

RUGER, Ch. J. It is desirable in the first instance to precisely determine the questions which are presented by the record before us.

The evidence is very brief and not in any respect conflicting, unless the facts proved are fairly susceptible of opposite inferences in different minds. At the close of the plaintiff's case, the defendant moved for a dismissal of the complaint without stating the grounds therefor, and upon the refusal of the court to grant the motion, took an exception. After the evidence was all in, the court directed a verdict for the plaintiff, to which direction the defendant also took an exception.

These two exceptions present the material points in the case. No request was made by either party to go to the jury upon questions of fact, and the only question presented by the exceptions, is whether upon any view of the evidence the plaintiff was entitled to recover. No objection that any evidence was inadmissible under the pleadings, was made and the action was tried and decided upon the whole case as presented by the proof without objection. From that it appeared that one F. F. Wilder purchased of the plaintiff a diamond of the value of \$500, and delivered to her in payment

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therefor a check signed by himself, and reading with its indorsements, as follows:

“JERSEY CITY, N. J., *June 1, 1883.*

“First National Bank, pay to myself or order five hundred dollars.

“F. F. WILDER.”

“Certified:

“FIRST NATIONAL BANK, JERSEY CITY.

“Payable at the American Exchange National Bank, New York.

“OMBERSON.

(Indorsed.) “T. LYNCH R.”

This check was not indorsed by Wilder. Omberson was assistant cashier of the defendant, authorized to certify checks, and certified the one in question on June 1, 1883, at the request of the drawer while still in his possession, and who at that time had funds in the bank. Upon this evidence it is clear that there was no contract made between Wilder and the plaintiff whereby any transfer of the deposit in the bank was intended to be made, beyond that which would follow the mere delivery of any check. The action can be supported only by proof that all of the conditions, upon which the authority of the bank to pay the check, was made to depend by the drawer, had been performed. (*Freund v. Imp. and Trader's Bk.*, 76 N. Y. 352, 357.)

It, therefore, seems to us that the only question in the case, is whether the bank could be made liable to pay to third persons, Wilder's funds by any transfer of this check, except one evidenced by the indorsement of his name thereon. It is well settled by authority that the mere drawing and delivery of a bank check to a third person by a depositor does not constitute an assignment to the payee therein named of the fund held by such bank. (*Etna Nat. B'k v. Fourth Nat. B'k.*, 46 N. Y., 82; *Commercial B'k of Albany v. Hughes*, 17 Wend., 94.) A check is analogous to a bill of exchange, and a bank cannot be made liable thereon except by its acceptance

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indorsed upon it in writing. (*Risley v. Phoenix B'k.*, 83 N. Y. 318.) An acceptance of the check, however, was made by the bank, we think, when, through its agent, it indorsed thereon a certificate of genuineness and directed its payment by the American Exchange Bank. That operated as a promise to pay it upon presentation at the American Exchange Bank, bearing Wilder's indorsement. The obligation of the bank as shown thereby amounts to a representation that the drawer has funds in the bank with which to pay the check, and that it will retain and pay them to the holder through its agency in New York upon presentation there bearing the proper indorsements (*Farmers and Merchants B'k v. Drovers and Butchers' B'k*, 14 N. Y. 623; 16 id. 125; 28 id. 425; *Security B'k v. Nat. B'k*, 67 id. 458, 460; *Clews v. B'k of N. Y.* 89 id. 418.)

Such a contract the bank had a right to make, limiting its liability to an order indorsed by the depositor, or his payee, and the depositor had the right to impose upon the bank the condition that his money should be paid out by it only, upon a check indorsed by himself or its payee. If the bank should disregard such a requirement it would do so at its own risk, but the holder has no legal right to impose such a liability upon it against its consent. It would certainly add much to the hazard of the transmission of funds by check, draft or otherwise, through the mail or express if the banks or agencies upon which they were drawn, should be compelled to pay them to the holder by an action at law, where they do not bear upon their face the evidence of the performance of the condition upon which the drawer has authorized their payment.

It was held in *Freund v. Importers and Traders' Bank* (*supra*), that a certification by the bank of a check in the hands of a holder who had purchased it for value from the payee, but which had not been indorsed by him, rendered the bank liable to such holder for the amount thereof. By accepting the check the bank took, as it had the right to do, the risk of the title which the holder claimed to have acquired from

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the payee. In such case the bank enters into contract with the holder by which it accepts the check and promises to pay it to the holder, notwithstanding it lacks the indorsement provided for, and it was accordingly held that it was liable on such acceptance upon the same principles that control the liabilities of other acceptors of commercial paper. In the case at bar the certification of the bank was made at the request of the drawer and was subject to the condition imposed by him, plainly written in the check, that it should not thereafter be payable except by his indorsement. The relation existing between a bank and its depositor is that of debtor and creditor, and the bank holds the fund subject to be paid out upon the direction of the creditor, according to the terms and conditions imposed by him. (*Ætna Nat. B'k v. Fourth Nat. B'k*, 46 N. Y. 82; *Crawford v. West Side B'k*, 100 id. 50, 56.) The bank's protection in the payment of checks consists in the fact that it has followed strictly the depositor's directions in disbursing his funds. Where a depositor has imposed the condition that his check shall not be paid without it bears his indorsement, the depository, if it pays it to a holder without such indorsement, runs the risk of the transaction, and takes the burden of showing that such holder has acquired in some way the lawful title to receive the funds. It may successfully defend such a payment if it can show that it made it to a person who, as against the drawer, was legally entitled to receive it, for, in that event, the drawer would suffer no damage thereby.

It was held in *Risley v. Phoenix Bank* (83 N. Y. 318), that a parol contract by a depositor for the transfer of the whole or any part of his deposit, is valid in law and invests the transferee with the right to sue for and recover the amount of such deposit or such part thereof as was intended to be transferred. It was also held in the same case that a depositor might concurrently with the delivery of a check to a third person enter into such a contract by parol as would transfer the fund represented by the check to the person named therein.

In such a case the liability of the depository is not predicated upon the check but that is used in connection with the parol

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agreement, as evidence of the contract transferring the fund. (*Oneida Bk v. Ontario Bk*, 21 N. Y. 490; *Risley v. Phoenix Bk*, *supra*.) The action arises upon the contract of assignment and not upon the check.

We are of the opinion that the evidence in this case did not authorize the trial court to find that Wilder intended to transfer any part of his deposit to the plaintiff, and there is no other theory upon which the action can, under the evidence, be maintained. The verdict was therefore improperly directed for the plaintiff.

The judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

All concur except EARL, J., not voting.

Judgment reversed.

GEORGE W. JOHNSTON v. HENRY SPICER et al., Appellants;
FRANCIS SPICER et al., Respondents.

107 185
144 409

107 185
f 162 112

107 185
77 AD 481

Ante-nuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts and will be enforced in equity according to the intention of the parties.

In order to effectuate such intention courts of equity will impose a trust upon the property agreed to be conveyed, commensurate with the obligations of the contract.

It is immaterial whether a trustee is appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired.

The contract also will be enforced in equity to accomplish the object the parties had in view, without reference to the validity of the agreement at law.

All rights of property, of whatever nature, revert to the People when the owner dies intestate and there is a failure of heirs to take such property. In respect to the rights so acquired by the State there is no essential difference between real and personal property, although the doctrine of escheat applies only to legal estates and does not, in a strict sense, affect either equitable estates or personal property.

The history of legislation in this State upon the subject of escheat and the administration of the estates of persons dying intestate without heirs, given.

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By an ante-nuptial agreement between G. (the man) and E. (the woman), G. covenanted and agreed that, in case of his death, without leaving lawful issue by the contemplated marriage, previous to the death of E., all of the real and personal property, of which he should die possessed, should belong to her. The parties intermarried, but had no children, and G. died intestate seized of certain real estate, upon which was a mortgage. E. died thereafter intestate, leaving no lawful heir. In a controversy as to the right to the surplus money arising on foreclosure sale *held*, that upon the death of G. the legal title to the real estate went to his heirs; but that by force of the marriage settlement, E. became the equitable owner, and a trust by implication arose in her favor; the heirs holding the title as a naked trust for her and subject to her right to be vested with it on demand; and that upon her death without heirs her interest and rights reverted to the State, and it was equitably entitled to the surplus.

Certain of the heirs of G. procured the passage of an act (Chap. 377, Laws of 1885), entitled "An act to release the interest of the People of the State of New York in certain real estate to * * * (said heirs), and for other purposes." Its first section purports to release to the persons named in the title the interest which the State acquired by escheat in certain real estate described. The second section assumes to release to said persons all the interest which the State has in the personal property, of which E. died possessed of, or was entitled to. *Held*, that the act was violative of the provision of the State Constitution (art. 8, § 16), which declares "that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Also, *held*, that the heirs of G. having the legal title to the property, and so presumably being in possession thereof at the time of the passage of the act, had the right to maintain their title and possession against all except E., or those who had lawfully succeeded to her rights; and so, those not named in the act were entitled to raise the objection that it did not vest those rights in the grantees from the State.

(Argued June 7, 1887; decided October 18, 1887.)

APPEAL by Henry Spicer and others, defendants, from order of the General Term of the Supreme Court in the first judicial department, made December 31, 1886, which reversed an order of Special Term directing as to the disposition of surplus money arising on foreclosure sale herein.

The material facts are stated in the opinion.

Edward F. Brown for appellants. Marriage settlements were assumed by the legislature, in making the revision of

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1830, as an existing mode of providing for the necessities of families. (Willard on Real Estate, 274; 1 R. S. 727-732.) All such contracts made before 1849 remain in full force. (Laws of 1849, chap. 375, § 3.) Such contracts are founded on the consideration of marriage, which is a good and valuable consideration. (*Bradish v. Gibbs*, 3 Johns. Ch. 523; *Wright v. Wright*, 54 N. Y. 440.) In England after-acquired property may be settled by the parties. (*Smith v. Osborne*, 6 H. L. C. 375; *In re Pedder*, 10 H. L. Eq. 585; Notes to Story's Eq. Jur. §§ 983, 984; Banning on Mar. Set. 80, 172, 179.) In the United States after-acquired property may be settled. (*Strong v. Skinner*, 4 Barb. 546; *Merritt v. Scott*, 6 Ga. 563; *In re Young v. Hicks*, 92 N. Y. 238.) Courts must carry into effect the intention of the parties to every instrument purporting to convey an interest or authorizing the creation of an interest in real estate. (2 R. S. 748, § 2; *Darling v. Rogers*, 22 Wend. 489; 2 Kent's Com. 165.) Marriage settlements are express trusts. (Story's Eq. Jur. § 981.) Although marriage articles are generally executory, settlements are executed trusts. (50 Amer. Dec. 374, *n.*; 1 Fonbl. Eq. R. Ch. 6, § 7; Bouvier's Inst. § 3947; Story's Eq. Jur. § 983.) The *ante-nuptial* agreement to confer title of real estate to wife will be enforced as if there had been a formal conveyance. (*Beardsley v. Hotchkiss*, 96 N. Y. 217.) No trustee was necessary. (*De Barante v. Gott*, 6 Barb. 492; *Strong v. Skinner*, *supra*.) Equity would treat the husband as trustee. (*Blanchard v. Blood*, 2 Barb. 352; Story's Eq. Jur. § 1380; 2 Kent's Com. 162, 171, 172; *Strong v. Skinner*, *supra*; *Bradish v. Gibbs*, 3 Johns. Ch. 522.) Trusts in real or personal property may now be proved by any writing signed by the party declaring the same. (*Cook v. Barr*, 44 N. Y. 156; *Peck v. Vandemark*, 99 id. 29.) The contention that the real estate in question descended to the heirs of George Spicer, because the settlement was not executed in the form of a will, cannot be sustained. (*Hathaway v. Payne*, 34 N. Y. 92; 1 R. S. 754, § 21; 2 Kent's Com. 165.) Though an instrument is void at law, it does not follow that it may not

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be enforced in equity. (*Laut's Appeal*, 95 Penn. St. 279; *Sanders v. Miller*, 79 Ky. 517; *In re Youngs v. Hicks*, 92 N. Y. 238; *Shephard v. Shephard*, 7 Johns. Ch. 86.) Ante-nuptial agreements in favor of the wife have always been favored in equity. (*In re Youngs*, 27 Hun, 54.) The objection that this was a mere possibility or expectancy, and, therefore, not assignable is untenable. (*Lampet's Case*, 10 Rep. 48; Powell on Mortgages, 17 note by Coventry; *Field v. Mayor, etc.*, 6 N. Y., 187; 2 Spence Eq. Jur. 865; *Stover v. Eycleshimer*, 4 Abb. Ct. App. Dec. 309; Story Eq. Jur. § 1040; Atherley Mar. Set. 58; *Miller v. Emans*, 19 N. Y. 390; *Edwards v. Varick*, 5 Den. 682.) Equity regards that as already done, which parties have agreed should be done, and which ought to have been done. (*Lanning v. Thompkins*, 45 Barb. 316; Story's Eq. Jur. § 64 g.) The intent generally is to secure a provision for the issue which neither the parents nor creditors of the husband can defeat. (Willard on R. E. 272; Story Eq. Jur. §§ 983, 984; *Wetmore v. Kissam*, 3 Bosw. 331, 336.) The land in question would have descended to Mrs. George Spicer's heirs, by virtue of the law converting formal trusts into legal estates; if not under the statute as to descendability of expectant estates. (1 R. S. 754, § 21.) Mrs. Spicer left no heirs. The proof thereof was sufficient. (*Jackson v. Etz*, 5 Cow. 314.) The State, therefore, succeeded to her rights. (Const. art. 1, § 11.) An estate in fee was conveyed to Mrs. Spicer. (*L. I. R. R. Co. v. Conkling*, 29 N. Y. 572; 1 R. S. 748, § 1.) Without even recourse to the rules of equity, the grant to Mrs. George Spicer is binding on the heirs of her husband. (1 R. S. 739, § 143.) Chapter 377, Laws of 1885, releasing the rights of the State to certain relatives of George Spicer, is constitutional. (*People v. Super. of Chaut. Co.* 43 N. Y. 10; *In re De Vancence*. 31 How. Pr. 289, 343; *People v. Canal Board*, 55 N. Y. 390; *Roosevelt v. Godard*, 52 Barb. 533; *People v. Bennett*, 54 id. 480; *People v. Super. of Orange*, 17 N. Y. 235.)

Charles DeKay Townsend for respondents. Ellen Spicer's sole remedy would seem to have been an action against the

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administratrix of her husband for a failure to perform his agreement. (*Peck v. Vandemark*, 99 N. Y. 29; *Sherman v. Butts*, 1 Abb. [N. C.] 20, n.) Chapter 377, Laws of 1885, under which respondents' claim is unconstitutional, being in violation of the sixteenth section of the third article of the Constitution, being both a private and a local act. (*In re N. Y. El. R. R. Co.* 70 N. Y. 350; *In re Church*, 92 id. 4; *People v. Super. Chaut. Co.* 43 id. 10; *Kerrigan v. Force*, 68 id. 383; *Gaskin v. Meek*, 42 id. 186; *In re Sackett*, 74 id. 102.)

RUGER, Ch. J. The controversy in this case arises, among the heirs of one George Spicer, over the distribution of surplus moneys accruing from a sale of lands under a mortgage foreclosure, and depends for its settlement mainly upon the effect to be given to a contract made between Spicer and one Ellen Donnagha on June 29, 1847, in contemplation of their marriage.

The appellants claim as legal heirs of George Spicer, and the respondents, who were also a portion of his heirs, claim the exclusive right to these moneys by virtue of a release from the State, of the interest said to have accrued to it by escheat, on the death of Ellen Spicer. The marriage contract was executed by George Spicer, as party of the first part, Ellen Donnagha, as party of the second part, and Peter Crawford of the third part. The party of the second part thereby conveyed certain real and personal property to Crawford in trust for her own use and benefit, and the contract then provided as follows: "It is hereby further covenanted and agreed, that in case of the decease of the party of the first part, without leaving lawful issue by the contemplated marriage, previous to the decease of the party of the second part, that then and in that case all of the real and personal property he may die possessed of, shall belong, and be the property of the party of the second part; and that, also, in case the party of the second part should die without having lawful issue by the said contemplated marriage, the property, both real and per-

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sonal, shall belong and be the property of the party of the first part; and the trustee shall, by good and sufficient conveyance or conveyances, assign the same to the said party of the first part." The parties subsequently married but had no children. Spicer died, intestate, on July 1, 1884, seized of the lands out of which the surplus moneys arose, and leaving his widow surviving and numerous heirs-at-law. The widow died in January following, intestate, and leaving no lawful heir. Upon the theory that the marriage settlement established a right in the widow to such real estate, which escheated to the State upon her death, the respondents procured the passage of chapter 377 of the Laws of 1885, the escheat bill already mentioned, and by reason of the interest thereby acquired, assert an exclusive right to the moneys in dispute.

The referee and the Special Term sustained the claims of the State's grantees under the statute, but the General Term reversed the orders awarding them the surplus moneys, and directed them to be distributed among all of the heirs-at-law of George Spicer, deceased. The theory upon which that count proceeded was that the marriage contract, so far as George Spicer's property was concerned, was designed to operate only upon a mere possibility which was not at common law the subject of a grant, and, therefore, no interest in the property passed under the contract to the widow, and none escheated to the State upon her death. It was assumed that a mere right of action to recover such land, would not escheat upon the death of its owner, and, therefore, third persons would take no interest in the land by virtue of a grant thereof from the State.

We are inclined to the opinion that the General Term erred in some respects in its view of the case, and that upon the death of George Spicer, his widow became by force of the marriage settlement the equitable owner of the real estate, and upon her death, without heirs, her interest therein reverted to the State, though not technically by escheat. No express trust was created by the marriage contract, but a trust by implication, in the property left by him, arose upon the death

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of George Spicer in favor of his widow. The legal title which was vested in him descended to his heirs at his death, by force of the statute of descents, and was held by them at the death of the widow. It did not vest in the widow by virtue of the contract under section 47 of the statute of uses and trusts, as that section is controlled by section 50, which provides that it shall not apply to trusts arising by implication of law. Neither was it affected by section 21 (3 Rev. Stat. [7th ed.] 2213), as that relates only to the express trusts authorized by the statutes and does not include such as are created by implication or intendment of law, and the descent of these lands would not therefore seem to be affected thereby. The property intended to be settled on the wife was such only as the settlor should die possessed of, and there would therefore, seem to be some difficulty in treating the husband during his lifetime, as trustee for his wife, since he had an undoubted right of disposition of the property during that time, and the equitable right of the wife arose only upon his death.

It would, therefore, seem that upon the death of George Spicer, the legal title to his real estate descended to his heirs, but they held it in trust for the equitable owner, and subject to her right to become vested with the title upon demand. (*Giddings v. Eastman*, 5 Paige, 561; *Wood v. Mather*, 38 Barb. 473, 479.) Ante-nuptial contracts, by which it is attempted to regulate and control the interest which each of the parties to the marriage, shall take in the property of the other, during coverture or after death, like dower, are favored by the courts and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. (2 Kent's Com. 165; *Matter of Youngs*, 27 Hun, 54; affirmed, 92 N. Y. 235.)

No especial formality is requisite in such instruments, and, in order to effectuate the intentions of the parties, courts of equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will decree their specific performance, and when such relief is inadequate or impracticable from the situation of the property

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or the character of the contract, will award damages for its breach. (*De Barante v. Gott*, 6 Barb. 496; *Peck v. Vandemark*, 99 N. Y. 29; Pomeroy's Eq. Juris. §§ 1297, 1403; Schouler on Domestic Relations, 263-266 *et seq*; *Pierce v. Pierce*, 71 N. Y. 154, 156.) It is entirely immaterial whether a trustee, to carry it into effect, has been appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired, if the contract is fair and reasonable and such as it is lawful for the parties to make, and the rights of creditors or third persons have not intervened, it will be enforced in equity in such a manner as to accomplish the object which the parties had in view, without reference to the validity of the agreement at law. (*Blanchard v. Blood*, 2 Barb. 354; *De Barante v. Gott*, 6 id. 496; Schouler's Domestic Relations, *supra*; Atherley on Marriage Settlements [London, 1813], 58.) The rule, as stated by Pomeroy in his work on Equity Jurisprudence is: "Among the agreements which the original common law treated as invalid irrespective of statutes, but which equity in the application of its conscientious principles regards as binding and enforces by granting its relief of specific performance, are the following: Agreements for the assignment or disposition of a possibility, expectancy or hope of succession; agreements to assign things in action; executory agreements made between a man and a woman who afterwards marry, which then became absolutely void at common law, but which equity may specifically enforce against either husband or wife at the suit of the other." (§ 1297.) (See *Stover v. Eycleshimer*, 46 Barb. 84.)

It is said in Bright's Husband and Wife (pp. 471 *et seq*), "a jointure which has been agreed by the husband before marriage to be made upon his intended wife will be good in equity although it be not actually so settled, but is permitted to remain in articles, or upon the husband's covenant; for such a jointress being a purchaser of the provision by the marriage, is entitled in that character to the aid and protection of a court of equity; accordingly such articles or covenant will be

specifically performed." He further says that "in *Tooke v. Hastings* (2 Vern. 97), where A. covenanted to settle lands of a certain value, and had no land at the time, but afterwards purchased land, it was held that such land should be liable."

* * * "The principle laid down by Lord Redesdale is this: 'That where a person acts for valuable consideration, as upon marriage, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he is able; and whenever that is the case, there is nothing in any of the authorities to raise a doubt that it shall have effect, so far as the person executing it has the power; and where the nature of the instrument is contrary to what the power prescribes, but demonstrates an intent to charge, it shall have the operation of charging in that form which the power allows.' It follows, therefore, that however the intent be shown, if it be in writing, the court will, in aid of the intention, supply the defects in the mode of execution in favor of the jointress; so that whether the intent to execute the power be by letter, memorandum, will, articles or covenant, a court of equity will aid the jointress, and supply all omissions." In the case of *De Barante v. Gott* (*supra*), an ante-nuptial contract had been executed between the plaintiff, who resided in France, and his intended wife living in New York, whereby it was provided, that in case of the death of the wife without leaving children, all her personal estate should become vested in her husband, and the real estate of which she should die seized, in the United States, should be immediately sold and the price thereof remitted to the plaintiff. Upon a bill filed by the husband to recover the real and personal property from the persons in possession, Judge Harris held that, if the instrument which created the right of the plaintiff in the property "had also appointed a trustee to carry into effect the object, as in the case of *Craig v. Leslie*, no one I apprehend would have doubted the authority or duty of such trustee to sell the real estate and remit the proceeds; but it is a rule of equity, which is said to admit of no exception, that it never wants a trustee. It is the

settled doctrine of equity that no trust shall be permitted to fail for the want of a trustee to execute it. Land to which a trust is attached remains chargeable with such trust in the hands of the heir or devisee. A court of equity will always establish and enforce a trust whenever a competent party applies for its aid, and presents a case entitling him to relief." * * * "The general rule as stated by Story (2 Eq. Jur., § 976), is that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust." The heirs at law being infants it was directed that a referee be appointed to sell and convey the real estate and pay the proceeds to the plaintiff.

In *Peck v. Vandemark* (99 N. Y. 29) it was held that an ante-nuptial agreement was established by the letters of the parties to the effect that the intending husband would, in case the plaintiff intermarried with him, make provision by giving her by will one-half of his property, and the use of the other half for her life. The parties having intermarried and the husband failing to make the provision agreed upon, it was held that this was a valid contract binding upon the testator, and the plaintiff could maintain an action against the executor to recover damages for the violation of the contract. The damages were held to be the value of one-half of the estate, both real and personal, absolutely, after paying debts and expenses of administration, and the use of the other half during her life.

It has been the constant practice of the courts of this country, as well as of England, to enforce ante-nuptial agreements according to their terms, whether they relate to existing or after-acquired property, and to decree a specific or substituted performance of them according to the nature of the case. (2 Kent's Com. 172; 2 Story's Eq. Jur. §§ 775, 1370; *Bradish v. Gibb*, 3 Johns. Ch. 523; *Reed v. Livingston*, 3 Johns. Ch. 481; Pom. Eq. Juris. §§ 1297, 1403; *Smith v. Osborne*, 6 H. of L. Cas. 375; *In re Pedder*, 10 L. R. Eq. 585;

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Hammersley v. Bonan De Biel, 12 Cl. & Fin 45; *In re Wilson's Exrs.*, 2 Barr, 325.)

These cases do not proceed upon the theory of a grant conveying a present interest in the property, but upon that of a contract intended to provide, in case of the death of one of the parties, an adequate provision for the support of the other, and, which, as they are founded upon a valuable consideration and not prohibited by public policy or principles of law, it would be inequitable to defeat or destroy. (2 Kent's Com. 165; Schouler's Dom. Rel. 263.)

The suggestion that such contracts may be invalid, as being of a testamentary character and as contravening the statutes regulating the execution of wills, is of no force, in view of the fact that for many centuries they have been sanctioned and protected by the courts, and their validity in this State has been expressly ratified and approved by statutory provisions. (Laws of 1848, chap. 200, § 4; Laws of 1849, chap. 375, § 3.) Here the contract is clear and explicit, that in case of Spicer's death before that of his wife all of the property, both real and personal, of which he should die possessed, shall belong to and be the property of his widow. In the case of the wife, her property was conveyed by the marriage articles to a trustee, who was directed, in the event of her death before that of her husband, to convey it to him, and nothing further remained to be done on the part of the wife to perfect the title of the husband in the contingency provided for. It cannot be doubted but that it was the intention of the parties, in case of the death of either, to vest the survivor with similar interests in the property of the other; and that the omission to provide in the articles for the method of transfer by the husband was occasioned by the fact that no property had then been acquired by him, or for some other sufficient reason. His covenant, however, is express — that his property shall belong absolutely to her in the event of his death without issue; and equity will enforce the covenant for the benefit of the widow so as to effectuate the intention.

It does not appear in the case at what time the sale of the

land under the foreclosure proceedings took place, nor the time when the title of the heirs to the real estate became divested by its sale, and converted from an interest in real property to that of one in personal property. Neither does it seem to us, in the view we take of the case, that this question is material. If the heirs became vested with the legal title on the death of George Spicer, they would retain a similar interest in the proceeds thereof which had, without any agency of theirs, been converted from real into personal property. At all events if this circumstance was material, there is no evidence in the case which enables the court to determine what the fact was, and we must deal with the case upon the facts contained in the record. The remaining question on this branch of the case has reference to the disposition which the law makes of the widow's equitable interest in the event of her death, before acquiring the legal title.

The respondents assert that no claim is made that rights of action escheat to the People, and such seems to have been the theory entertained by the General Term. In the strict sense of the term escheat, perhaps, this may be so, but we assume it to be the law in this State that all rights of property, of whatever nature they may be, revert to the People when the owner dies intestate, and there is a failure of heirs or next of kin, to take such property. We believe it to be the established rule in all civilized countries that, in such cases, the property of a resident dying intestate without heirs, reverts to the Sovereign or State, to be administered for the general benefit of the community in which he dies. While there is an absence of specific statutory authority declaring the rights of the State in such property, it is believed to be the uniform practice for it to assume by force of natural law, the control of such property, and to administer it for the benefit of those concerned, and, in the absence of any legal heir, to appropriate the proceeds to the uses of the State.

It is said, in 4 Kent's Commentaries, 425, "It is a principle which lies at the foundation of the right of property that, if the ownership becomes vacant, the right must necessarily sub-

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side into the whole community in whom it was originally vested when society first assumed the elements of order and subordination." In a note, it is stated, "the escheats spoken of in the text relate exclusively to land, movables never escheated in the technical sense; and if the owner died intestate and left no lawful representatives, the personal estate remained at the disposition of the crown. In this country it must vest in the State, and so the statute law in some of the States has specially provided." In *Perry on Trusts* (§ 327), it is said that it was held in *Burgess v. Wheate* (1 Ed. 177), "that if the *cestui que trust* left no heirs, the trust estate did not escheat, but that the trustee thenceforth held the estate discharged of the trust." "This is upon the principle that there is no want of a tenant to the land, the trustee being clothed with all the rights of ownership, against all the world except the *cestui que trust* and those claiming under him. But this principle does not apply to chattels where there can be no tenant, nor to leaseholds, nor to an equity of redemption. In the United States, trustees would hold personal property subject to the right of the State as *ultima haeres* in case the *cestui que trust* died without heirs or next of kin, and it is conceived they would hold real estate under the same rule." Washburn on Real Property (vol. 3, p. 49) says: "While escheat was regarded as an incident of feudal tenure, it did not extend to the equitable estates of *cestui que trust*, and, by analogy, it is generally understood that if a *cestui que trust* dies intestate, without heirs, the trust fails, and the trustee holds an absolute estate in the property free from the claim of any one. But it is settled by the courts of Maryland, and intimated by Judge KENT in respect to New York, that such would not be the case under the statutes and that if a *cestui que trust* should die without heirs, his equitable estate would escheat to the State."

A very elaborate discussion of the history and origin of the right of the State to appropriate the property of a person dying intestate, without heirs, in Kentucky, is contained in the case of *Commonwealth v. Blauton* (2 B. Mon. 393). It is there said that the right to administer upon the estate of an

intestate is an attribute of sovereign power, and it was held that an action on the part of the State to recover the assets of an intestate, dying without legal heirs, remaining in the hands of his administrator, could be maintained.

In a note to section 990 of Pomeroy's Equity Jurisprudence the author says: "When the trust is personalty, on the death of the beneficiary, intestate and without any next of kin, the crown or the State succeeds to his property upon other grounds than that of common-law escheat, citing many authorities.

If we turn to the legislation of this State we shall find that the subjects of escheat, and the administration of estates of persons dying intestate without heirs, have generally been treated together as analogous, and result in the appropriation by the State of all such property both real and personal. The first act we have been able to discover is chapter 35 of the Laws of 1792, entitled "An act concerning escheats." That act provides, in all cases "where administration hath been, or hereafter shall be, granted to any person or persons not the widow of or not of kin to the intestate, and no person hath or shall, within one year after granting the letters of administration, appear to claim the personal estate of such intestate as next of kin, then, and in every such case, the administrator or administrators shall pay the amount of the personal estate, after deducting the debts and funeral charges of the intestate, into the treasury of the State." In case the administrator neglects to obey this requirement the attorney-general is authorized to bring an action in the name of the State to recover the amount. By the second section it was provided "that whenever the attorney-general shall be informed * * * that any person has died seized of any real estate within the State without making any devise thereof, and leaving no heir capable of inheriting the same," he shall take proceedings in the name of the State to recover the same, and upon recovery thereof it shall be sold by the State and the proceeds thereof paid into the treasury of the State.

The provisions of this act were substantially re-enacted under the same title by chapter 73 of the Laws of 1801, and

also by chapter 19 of the Revised Laws of 1813. No material change in legislation on this subject was made until the revision of the statutes in 1828, when these subjects were separately treated and a new system was adopted for administration upon the estates of such persons.

Chapter 1, title 1, article 1 of part 2 of the Revised Statutes provides that: Section 1. The people of this State in their right of sovereignty are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State, and all lands the title to which shall fail from a defect of heirs, shall revert or escheat to the people. Section 2. All escheated lands, when held by the State or its grantees, shall be subject to the same trusts, incumbrances, charges, rents and services to which they would have been subject had they descended; and the court of chancery shall have power to direct the attorney general to convey such lands to the parties equitably entitled thereto according to their respective rights or to such new trustee as may be appointed by the court." Section 1977 of the Code of Civil Procedure provides for the enforcement of these provisions.

The subject of administration upon chattels and personal property was regulated by article 2, title 6, chapter 6, part 2, Revised Statutes (3 R. S. [7th ed.], 2319, *et seq.*), whereby it was provided that "the county treasurer, in each of the counties of the State, shall, by virtue of his office, have authority to collect and take charge of the assets of every person dying intestate, when such assets shall amount to \$100 or more, either in his county or out of it, upon which no letters of administration shall have been granted in the following cases: 1st. Whenever such person shall die, leaving assets, in the county of the treasurer, and there shall be no widow or relative in the county entitled or competent to take letters of administration on such estate. 2d. Whenever assets of any person so dying intestate shall, after his death, come into the county of such treasurer, and there shall be no person entitled or competent to take administration of such estate." The act after providing for the manner in which he shall dis-

charge his duties and convert the estate into money proceeds (§ 71), "The balance of any money in his hands shall be paid into the treasury of the State for the benefit of such persons as shall be entitled to receive the same." The statutes also provide for the appointment of a public administrator in the city of New York, who has the exclusive right to administer in the cases referred to, and who is directed to pay into the city treasury all moneys arising from such estates except such as may be paid out and expended in the process of administration.

In the Constitution of 1846 the matter of escheats was made the subject of express provision, and it was enacted that "all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people." (Const. art. 1 § 2)

From this review of the law it would seem that there is no substantial difference between real and personal property in respect to the rights acquired by the State, upon the death of its owner, intestate, without heirs or next of kin. A clear deduction from the authorities seems to lead to the conclusion that the doctrine of escheat applies only to legal estates and does not in a strict sense affect either equitable estates or personal property. It seems also to follow from the authorities cited, that upon the death of Ellen Spicer the State took not the land, but succeeded to the equitable right which she had to a conveyance thereof. This right may possibly be subject to the claims of creditors, or other equities which would have to be adjusted in an action, by the equitable owners to recover the possession of the land.

The omission in the provisions of the Revised Statutes of the words "died seized of" as contained in the Revised Laws of 1813, relating to escheats is not supposed to have effected any change in the law as the revisors say in their note to this section that it is "new in terms but implied in Revised Laws (380, § 2)." A new rule, however, was intended to be introduced by section 2 of the Revised Statutes, which provides that all escheated lands shall be held by the State or its grantees subject to the same trusts, etc., to which they would have been subject had they descended. This enactment was

intended to obviate the severe rule of the common law by which such lands when escheated were held to belong to the king free from the trust. (Revisors Notes, 5 N. Y., Statutes at Large [Edm. Ed.], 297.)

With reference to the personal estate of persons dying intestate without next of kin, it appears to have been the uniform practice of the State since its organization to take such property, and hold it either for the benefit of the community at large or some division of the State, or to be returned to such persons as may from considerations of natural justice and equity seem to the legislature to be entitled thereto.

We think, therefore, that the property left by Mrs. Spicer reverted to the State upon her death, and that it was competent for the legislature to grant the rights thereby acquired, and the right to administer thereon to such person or persons as in their discretion they judged equitably entitled thereto. (*Englishbe v. Helmuth*, 3 N. Y. 294.)

The only remaining question relates to the validity of the act by which the legislature assumed to dispose of the property in favor of the appellants.

It is claimed by the respondents that it is void for the reason that it violates the requirements of section 16 of article 3 of the Constitution providing that "no private or local bill which may be passed by the legislature, shall embrace more than one subject and that shall be expressed in the title." It is argued that the act embraces more than one subject, and that no subject whatever is properly or correctly described in its title. The title reads as follows: "An act to release the interest of the people of the State of New York in certain real estate to Henry Spicer, Catharine Valentine, Georgiana Farrington, Sarah F. Chapman and Charles Spicer, and for other purposes." The act is clearly both private and local since it relates to a specified piece of real estate described as lying and being in the city of New York; and it purports to convey such land to five persons for their individual use and benefit. (*Matter of N. Y. Elevated R. R. Co.*, 70 N. Y. 327, 350.) By separate provisions it first purports to release the interest which the State acquired by

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escheat in certain real estate described ; and secondly, it assumes to release all the interest which the State had to the personal property and effects of which Ellen Spicer died possessed of or was entitled to. As the act reads there is no apparent connection between the real property described in the first section and the personal property referred to in the second section, and from all of the information furnished by the act, we are led to conclude that the Legislature intended to deal separately, not only with real and personal property but also property derived from different sources. It is quite obvious that the title does not describe the interest intended to be conveyed by the latter section, for it is not only not referred to therein, but it is excluded by implication, through the reference to an interest in real estate alone ; and it is equally clear that the first section describes no interest possessed by the State, for we have seen that it had an equitable right of action only. That the act embraced in fact more than one subject, can hardly be denied inasmuch as the title itself specifies that it relates to a transfer of real estate and "for other purposes."

Even if we were able to overcome this objection, we are of the opinion that the lack of any intelligible reference in the title to the real object of the act, and its palpable misdescription thereof, is fatal to its validity. The true object of the enactment was, obviously, to convey to some one of the heirs of George Spicer the rights of property acquired by the State through escheat or forfeiture in the real and personal property of Ellen Spicer. No reference is made in the title to the former ownership of either George or Ellen Spicer, or to the fact that the State acquired its interest by escheat or reversion ; no indication that the act was intended to transfer any interest in personal property, and no reference to the place or location of the property affected. There is absolutely no clue in the title by which the attention of any interested party would naturally be attracted to, or informed of the real object of the act. The manifest intention of the constitutional provision was to require sufficient notice of the subject of proposed legislation of a private or local char-

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acter, to be so expressed in the title, as to put not only interested parties, but, also, all persons concerned in the proposed legislation, upon their guard, and to inform all persons reading it, of the general purpose and scope of the act. While this is not required to be done by pursuing any particular formula, or with much detail of specification, and great liberality of construction should be indulged in by the courts to uphold the constitutionality of legislation, yet a due regard to constitutional requirements demands that when its plain and obvious purposes are disregarded or evaded, the judgment of the court should give effect to its provisions. (*Purdy v. People*, 4 Hill, 384, 418; *People v. Hills*, 35 N. Y. 452.)

It was said by Judge DAVIS, in the case last cited: "It is not a sufficient compliance with this provision that a subject is expressed in the title of the act, the true and actual subject or object must be there expressed, or the evil and mischief which the framers of the Constitution sought to avert and prevent will not have been effectually guarded against." Judge GARDINER says that "the purpose of the sixteenth section was that neither the members of the legislature nor the public should be misled by the title." (See *Mutual Ins. Co. v. City of New York*, 8 N. Y. 241, 253.)

An examination of the statutes relating to escheated estates for several years past, shows that from twenty to thirty are usually passed in each year, and that the titles of such acts, though varying widely in the phraseology employed, usually contain a reference to the locality of the property affected, or the name of the person through whose decease it is claimed to have been forfeited, or some other circumstance affording information as to the scope and purpose of the act. While many of them are clearer and more concise than others, yet in every one of the twenty-two passed at the session of 1885, except chapter 377, we find some reference to the circumstances calculated to direct the attention of interested parties to the object of the proposed legislation.

There would seem to be no excuse, in the desire to secure brevity and conciseness of statement, for a title which was so

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well calculated to elude the vigilance of interested parties as the one under consideration. It seems to us that the title of this act was evasive and misleading, and comes fairly within the letter and meaning of the constitutional inhibition.

As we have heretofore seen the legal title to the property in question was in the heirs-at-law of George Spicer, and at the time of the passage of the act they were, for that reason, presumably in possession of the property and the legal owners thereof. This title and possession they had a right to maintain against all persons except Ellen Spicer, or those who had lawfully succeeded to her rights; and had such a standing in court as authorized them to raise the objection that the act did not vest the rights of Ellen Spicer, in the grantees from the State.

The conclusion reached by us is, that the State not having parted with its interest in the property in question by chapter 377, Laws of 1885, is equitably entitled to the surplus moneys arising on the foreclosure sale; and that, consequently, neither of the persons filing claims thereto has shown any superior right over that of other claimants, and is not entitled to an order giving him, or them, exclusive rights therein. Under the circumstances of this case, we are of the opinion that there should be a rehearing of the matter before the Special Term, of which the attorney general, in view of our opinion as to the constitutionality of chapter 377, should have notice and be afforded an opportunity to be heard.

This conclusion renders it necessary to affirm the order of the General Term, so far as it reverses the order of the Special Term directing distribution to the grantees of the State; and to a reversal of that part of its order directing a distribution of the surplus among all of the heirs of George Spicer. An order to this effect should be entered, without costs to either party, and the case should be remanded to the court below for further consideration.

All concur.

Ordered accordingly.

Statement of case.

107 205
130 464THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
GEORGE CLEMENTS, Respondent.

The indictment herein charged defendant with perjury in verifying a quarterly report made by a State bank, of which he was cashier, to the banking department. The verifying affidavit was set forth in the indictment, which charged that defendant, at the time of making the affidavit, had full knowledge of the real and true condition of the bank and of the matters stated in the report, and that he well knew, when he swore to the affidavit, that the report and accompanying schedules were false and untrue, but wickedly and corruptly swore that they were true to the best of his knowledge and belief. The indictment then set forth specifically several statements contained in the report, in respect to each of which it averred that defendant well knew, at the time he swore to the report, that said statement was not true according to the best of his knowledge and belief, and that the fact was otherwise than as stated, specifying the difference. It was objected that the indictment was defective, in that it did not directly allege that the statements in the report were, as matter of fact, untrue. *Held*, untenable; that the averments in the indictment amounted to an allegation that the statements were false.

Defendant interposed a general demurrer to the indictment. *Held*, that, conceding it was technically defective in the form of the allegations, the objection could not be raised by demurrer under the Code of Criminal Procedure (§ 323), nor did the defect render the indictment insufficient (§ 285).

It seems that, under the common-law system of pleading, such an objection can only be taken advantage of by special demurrer; it is not available on general demurrer or on motion in arrest of judgment.

People v. Clements (42 Hun, 353) modified.

(Argued June 24, 1887; decided October 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made January 4, 1887, which reversed a judgment of the Court of Oyer and Terminer, in and for the county of Washington, entered upon a verdict convicting the defendant of the crime of perjury and directing a discharge of the defendant. (Reported below, 42 Hun, 353.)

The substance of the indictment and the material facts are stated in the opinion.

Statement of case.

Edgar Hull for appellant. But one crime is charged in the indictment within the provisions of the Code of Criminal Procedure. (Code Crim. Pro. §§ 278, 279, 285; *Harris v. People*, 64 N. Y. 149; *People v. McKenna*, 3 Park. 510; *State v. Blaisdell*, 59 N. H. 328; Penal Code, § 100; *Ortner v. People*, 4 Hun, 323.) The report set out in the indictment purported to give a true statement of the condition of the bank in respect to the items and particulars required by the law, and was, therefore, authorized by law. (Laws of 1882, chap. 409, § 20; *People v. Vail*, 6 Abb. [N. C.] 206.) Defendant's claim that the indictment is defective in that it does not set forth the details which go to make up, or are prerequisite to the oath required by the statute, section 20 of the Banking Act, is untenable. (Greenl. on Ev., § 5; *Tuttle v. People*, 36 N. Y. 431, 436; *People v. Phelps*, 5 Wend. 9, 16; 2 Chitty's Cr. L. 307; *People v. Treadway*, 3 Barb. 470; *Burns v. People*, 59 id. 531; *Campbell v. People*, 8 Wend. 636; *Eighmy v. People*, 79 N. Y. 546; Code Crim. Pro., § 285; *Phelps v. People*, 5 Wend. 9, 19.) When a person says he has knowledge of a fact, the courts interpret his meaning to be that he has positive evidence of it, that he positively asserts to the fact itself, that the facts really exist to his own personal knowledge. (*Edwards v. Lent*, 8 How. 29; *Lloyd v. Burns*, 38 N. Y. Spr. Ct. Rep. 423; 62 N. Y. 651; Code Crim Pro., § 282; *Ballard v. Lockwood*, 1 Daly, 158, 162; *Dilcher v. State*, 39 Ohio St. 130; *State v. Lindenburgh*, 13 Tex. 27; *State v. Wood*, 17 Ia. 18, 20; *People v. Gates*, 13 Wend. 311; 1 Hawk. P. C., chap. 69, § 6; *Pedley's Case*, 1 Leach, 325; *Miller's Case*, 3 Wils. 427; *People v. Robinson*, 3 Wheeler's Cr. C. 180; *People v. Cruikshank*, 6 Black. 62; *State v. Ellison*, 8 id. 225; *Lambert v. People*, 76 N. Y. 224; *Byrnes v. Byrnes*, 102 id. 9; *Comm. v. Johns*, 6 Grey, 234, 276; *Reg. v. Rhodes*, 2 Ld. Raymond, 887; 2 Chitty's Cr. L. 312; *State v. Hascell*, 6 N. H. 358; *Harris v. People*, 64 N. Y. 148, 153; *Wood v. People*, 59 id. 117, 122; *Comm. v. Grant*, 116 Mass. 17.) The motion to quash the indictment on the ground that it was not intelligible was properly denied. (Code Crim. Pro.,

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§§ 273, 312, 313, 321, 678; *People v. Petrea*, 92 N.Y. 128, 145.) The several assignments of perjury were sufficiently proved at the trial. The proof of the falsity of the oath need not be direct and positive. (*United States v. Wood*, 14 Pet. 430, 437, 447; 1 Greenl. on Ev., § 257; *People v. Christopher*, 2 Cow. Cr. R. 270; *People v. Grimshaw*, 2 N. Y. Cr. R. 390; *Humphrey v. People*, 18 Hun, 393; *Paine v. Barnum*, 59 How. 303, 311; *German Sav. B'k v. Wulfekuhler*, 19 Kan. 60; *Wood v. People*, 59 N. Y. 117, 121; *Harris v. People*, 64 id. 148, 153; *Comm. v. Johns*, 6 Gray, 274, 276; *State v. Hascell*, 6 N. H. 352; *Comm. v. Grant*, 116 Mass. 17.)

Lyman G. Northrup for respondent. The indictment did not state acts sufficient to constitute a crime. (Laws of 1882, chap. 409, § 20; *People v. Cooper*, 3 N. Y. Cr. R. 117, 119.) The indictment is defective as it does not contain "a plain and concise statement of the act constituting the crime." (*People v. Wise*, 2 How. [U. S.] 97, 98; Code, §§ 273, 275; *Allen v. Patterson*, 7 N. Y. 476, 478; *Bristol v. R. & S. R. R. Co.*, 9 Barb. 158.) If the offense be a statutory one, then the indictment must state all the facts constituting the statutory offense so as to bring the accused precisely within the provisions of the statute. (*Eckhardt v. People*, 83 N. Y. 462; *People v. Allen*, 5 Denio, 76, 79, 80; *People v. Wilber*, 4 Park. Cr. R. 419.) A fact not alleged cannot be proved. (*People v. Gates*, 13 Wend. 311; *People v. Miller*, 2 Park. Cr. R. 197; *People v. Tawonan*, 4 id. 514; 42 Hun, 350.) There was a fatal variance between the report set out in the indictment and that given in evidence. (Roscoe's Cr. Ev. 816; Arch. Cr. Pl. [Marg.] 46, 99, 102; 1 Wharton Cr. L., §§ 307, 606, 607, 2268-2270; 1 Cow. and Hill notes, 518 [n. 407]; Barb. Cr. L. [2d ed.] 201, 334, 398; *Comm. v. Stow*, 1 Mass. 54; *Comm. v. Wellington*, 89 id. 299, 301; *Lambert v. People*, 76 N. Y. 220, 228, 239; *McGary v. People*, 45 id. 153.)

RAPALLO, J. The judgment of the General Term in this case, not only reversed the conviction in the Oyer and Terminer but discharged the defendant. A new trial was not ordered

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because the court was of opinion that the indictment was fatally defective, and that a valid conviction could not be had thereon. While we concur in the conclusion of the General Term, for the reason stated in its opinion that the record discloses errors committed upon the trial, authorizing a reversal of the conviction, we do not agree to the further conclusion that the indictment was so defective that a conviction thereon could not be sustained.

The defendant was charged with perjury in the verification under oath of a quarterly report made by the State Bank of Fort Edward, of which he was cashier, to the banking department of the State, which report purported to contain a true statement of the condition of the bank on the morning of March 22, 1884. The affidavit of the defendant verifying the report was set forth in the indictment, and stated that the report with the schedule accompanying the same (both of which were set forth in full), was in all respects a true statement of the condition of said bank before the transaction of any business on the 22d day of March, 1884, to the best of the knowledge and belief of the deponent. The point upon which the General Term, in the opinion there delivered, based the conclusion that the indictment was fatally defective, was that the falsity of this affidavit was not sufficiently averred.

The indictment charged that on the 22d and 29th days of March, 1884, the defendant had full and certain knowledge of the real and true condition of the affairs, transactions, assets and liabilities of the said bank, and of all the matters and statements contained in said report and schedule accompanying the same, as the same actually existed before the transaction of any business on the morning of March 22, 1884. It then set forth the report, schedule and affidavit verifying the same, and averred that the defendant when he swore to the same well knew that said report and the accompanying schedules were false and untrue, and then wickedly and corruptly swore that they were true to the best of his knowledge and belief, he then having knowledge and the grounds for belief that said report and schedules were false and untrue. It then specified

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several statements contained in the report in respect to each of which it averred that the defendant well knew at the time he swore to said report, that the fact was otherwise than as stated, specifying particularly the difference, and charged that the statement was then well known to him to be not true, according to the best of his knowledge and belief.

The defendant interposed a demurrer to the indictment, which was overruled. He then pleaded not guilty, and after the verdict was rendered made a motion in arrest of judgment, which was denied. The objection now made to the indictment is that the indictment does not, in direct terms, aver that the statements contained in the report, and in respect to which perjury is assigned, were, as matter of fact, untrue, but only that the defendant *well knew* them to be untrue, and *well knew* the facts to be otherwise than as stated in the report. The district attorney contends that the indictment does, in direct terms, negative the affidavit, which was that the report was a true statement, etc., "according to the best of his knowledge and belief." That it avers that his knowledge was directly the contrary of what he swore to. There is much force in this contention. But giving full effect to the proposition that it was necessary to negative the facts which the defendant swore to on information and belief, we think that the indictment did, in substance, contain such a negative. It averred, in the first place, that the defendant had at the time full and certain knowledge as to the real and true condition of the bank in respect to the matters in question, and that he well knew that the facts were other than as stated in the report, and well knew that the statements in the report were false. It logically follows that these averments amount to an allegation that the statements were false. His knowledge as to the matter stated being full and and certain, he could not know the statements to be false unless they were so.

Under the common-law system of pleading it was a rule that statements must be certain and positive, and not by way of reasoning or argument, which would lead to the fact intended to be averred; and it was a good objection to a pleading that

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its allegations were argumentative. But this objection was not one of substance, but only of form, and could only be taken advantage of by special demurrer. It was not available on general demurrer, or on motion in arrest of judgment. (*Spencer v. Southwick*, 9 Johns. R. 314; *Marie v. Garrison*, 83 N. Y. 14, 23.) A pleading is deemed to allege what can by fair and reasonable intendment be implied from the facts stated, and a general demurrer for insufficiency was not sustainable on the ground that the facts were argumentatively or otherwise imperfectly or informally stated. The objection to this indictment, if there be any, was that the falsity of the statements sworn to was only argumentatively alleged; but that it was fairly, and even necessarily, to be implied from the facts stated is very clear. The objection goes only to the form of the allegation.

The Code of Criminal Procedure enumerates the grounds upon which a demurrer may be interposed (§ 323), and does not permit a demurrer for imperfection in the form of the allegations, but, on the contrary, section 285 declares that "no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of an imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Under the indictment in question, the prosecution was required, for the purpose of convicting the defendant, to prove that he knew the specified statements in the report to be false, and this proof necessarily involved proof that they were false.

Various other objections were made to the sufficiency of the indictment. We have examined them all but do not deem it necessary to go over them in detail. Our conclusion is that neither of them discloses any substantial defect which warrants the discharge of the defendant.

The judgment of the General Term should be modified so as, instead of discharging the defendant, to award a new trial, and as modified affirmed.

All concur except EARL, J., not voting.

Ordered accordingly.

Statement of case.

JAMES T. SCARFF, Respondent, v. BENJAMIN F. METCALF et al.,
Appellants.

In the performance of the duty, imposed by maritime law upon the owners of a vessel, of rendering such care and medical aid to seamen employed thereon as circumstances will admit, the master stands as the agent and representative of the owners, and his negligence is theirs.

A mate, although an officer, is a seaman; and while both he and the master are fellow servants of the owner, they are not such in respect to the owner's duty to the seamen which the master performs.

In an action against the owners, therefore, for neglect of the master in the performance of such duty, it is not a defense that the neglect was that of a fellow servant.

Where there is a charter of a vessel the general owner still is responsible to the seamen for the performance of said duty, unless there has been an actual demise of the vessel, such as to take from the owners all possession, authority and control.

Where, therefore, a vessel was sailed by the master, one of several joint owners thereof, under an arrangement that he should sail it on shares, pay for victualing, manning and furnishing supplies, the other owners having nothing to do therewith. *Held*, that this was not an actual demise, and that all the joint owners were liable to the mate of the vessel for damages sustained by reason of the neglect of the master to furnish and render to him necessary medical attendance and care.

Taggard v. Loring (16 Mass. 336); *Cutler v. Winaur* (6 Pick. 335) disapproved.

Hallet v. C. Ins. Co. (8 John. 272); *Thorp v. Hammond* (12 Wall. 408) distinguished.

(Argued June 30, 1887; decided October 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below, 36 Hun, 202.)

This action was brought by plaintiff, who was mate of the barkentine owned by defendants jointly, to recover damages alleged to have been caused by their negligence in omitting to provide him with proper and adequate medical attendance and care when sick.

The defendants, Yates and Metcalf, alone were served with

107	211
135	6
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the summons, and they appeared and answered separately. Metcalf set up as a defense that the vessel was chartered to Yates, who alone had the custody, management and control thereof.

The material facts are stated in the opinion.

Joseph A. Shoudy for appellants. The defendant Metcalf was not responsible for the acts of the defendant Yates during the voyage. (*Blackwell v. Wiswell*, 24 Barb. 355; *King v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 184; *Hexamer v. Webb*, 101 id. 383; *Hallett v. Col. Ins. Co.*, 8 John. 272; *Tuckerman v. Brown*, 17 Barb. 191; *Felton v. Deall*, 22 Vt. 170; *Ladd v. Cholard*, 1 Ala. 366; *Macy v. Wheeler*, 30 N. Y. 241.) When a vessel is employed by the master under an agreement by which he is to man and victual the vessel, he is the owner *pro hac vice*. (*Thorpe v. Hammond*, 12 Wall. 408; *Thomas v. Osborne*, 19 How. [U. S.] 22; Abb. on Ship. Marg. 35, n.; *Hallett v. Col. Ins. Co.* 8 John. 271; *Cutler v. Wisner*, 6 Pick. 335; *Thompson v. Hamilton*, 12 id. 428; *Manter v. Holmes*, 10 Metc. 402; *Taggard v. Loring*, 16 Mass. 336; *Emery v. Hersey*, 4 Greenl. 407; *Cutter v. Thurlo*, 20 Me. 213; *Reynolds v. Tappan*, 15 Mass. 370; *The Phebe*, 1 Ware, 266; *Thompson v. Snow*, 4 Greenl. [Me.] 264; *Skolfield v. Potter*, 2 Ware, 394; *Blake v. Ferris*, 5 N. Y. 49; *Martin v. Tribune Ass'n*, 30 Hun, 392; *Hexamer v. Webb*, 101 N. Y. 383.) The plaintiff and Yates were fellow servants and the defendant Metcalf was not responsible to one of the servants for the negligent acts of the other. (*Crispin v. Babbitt*, 81 N. Y. 521; *McCosker v. L. I. R. R. Co.* 84 id. 77; *Slater v. Jewett*, 85 id. 61; *Murphy v. B. & A. R. R. Co.* 88 id. 146.) It does not make any difference that the one by whom the injury was caused was in command over the one injured, and has the power of employing and discharging. (*Malone v. W. T. Co.* 5 Biss. 315; *Malone v. Hathaway*, 64 N. Y. 5; *Wilson v. Merry*, L. R., 1 Scotch Div. App., 326; *Matthews v. Case*, 61 Wis. 491.) The mere omission to discharge a contract obligation has been held to be actionable negligence. (*Harden v. Gordon*,

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2 Mason, 547; *Reed v. Canfield*, 1 Sumn. 197; *The Ben. Flint*, 1 Abb. [U. S.], 129; *The Forest*, 1 Ware, 433; *The Nimrod*, id. 9, 11, 12.) The plaintiff was erroneously allowed to recover consequential damages. (*Chadwick v. Woodward*, 12 Daly, 399; *Mayne on Damages*, 26; *Middlekauff v. Smith*, 1 Md. 329; *Forte v. Oundorff*, 7 Heisk. 167; *Academy of Music v. Hackett*, 2 Hilt. 234.) Only such damages as are the primary and immediate result of the breach of contract are to be considered. (*Mayne on Damages*, 8; 1 Sedgwick on Damages, 90.) The rule of damages in civil actions does not depend upon the form of the action. (*Baker v. Drake*, 53 N. Y. 211; *Stapenhorst v. Am. Man. Co.* 15 Abb. [N. S.], 357.)

William Sullivan for respondent. The State Courts have concurrent jurisdiction with the United States District Courts of action *in personam* founded on maritime torts or contracts, and therefore this court has jurisdiction of the action. (2 Pars. on S. & Ad. [ed. 1869], 81, 82 and *n.* 1; *Hardin v. Gordon*, 2 Mason, 541; *Reed v. Canfield*, 1 Sumn. 195, 197; *The Steamship N. America*, 5 Ben. 486; *Brown v. Overton*, 1 Sprague, 462; *Tomlinson v. Hawett*, 2 Saw. 278; *City of Alexandria*, 17 Fed. Rep. 395; *The Hine v. Trevor*, 4 Wall. 555; *Moseley v. Scott*, 5 Am. L. Reg. [N. S.], 599; *Peterson v. Swan*, 18 J. & S., 46; *Belt v. Cummings*, 48 Am. Rep. 199.) A tort may be founded upon a breach of duty dependent upon or independent of contract. (Addison on Torts [D. & B.'s ed.], 17, 18.) The appellants being co-owners, and one of them also the master of the vessel, the presumption is that the relation of seaman and master and owners existed between them and the respondent, and therefore the burden of proof was on them to rebut this presumption. (1 Pars. on S. & Ad. [ed. 1869], 106; *Green v. Briggs*, 6 Hare, 395; *Baker v. Corey*, 19 Pick. 496.) An agreement that for sailing the vessel the master shall have half her earnings is only a mode of paying him for his services. (*Dry v. Boswell*, 1 Camp. 329; *Dowson v. Leake*, 16 Eng. C. L. Rep. 432; *Baker v. Corey*, 19 Pick. 496; *The Blessing*, 3 L. R. P. D., 35; *Steele v. Lester*,

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3 L. R. P. D., 121; *Oakland C. Man. Co. v. Jennings*, 13 Am. R. 209; *Kenzel v. Kirk*, 37 Barb. 113; 32 How. 269; *Vose v. Cockroft*, 45 Barb. 58, 59; *McCready v. Thorne*, 49 id. 438; 54 N. Y. 454, 461; *Stroker v. Elting*, 97 id. 102; *The Phebe*, 1 Ware, 266; *Lyman v. Redman*, 23 Me. 289.) The relation of seaman and master and owner always exists where the owners and master participate in the earnings of the vessel. (*Skolfield v. Potter*, 2 Ware, 394, 406.) Yates was the *alter ego* of the rest of the part owners as to the duty which they owed to the respondent. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Fuller v. Jewett*, 80 id. 46; *Peterson v. Swan*, *supra*; *Brown v. Overton*, *supra*; *Tomlinson v. Hawett*, 2 Saw. 278.) Whether or not the master of a vessel is, as to all matters within the scope of his authority, the *alter ego* of the owners, for the reason that he has the right to command the movements of the vessel, and to employ, discharge and direct all the persons on board engaged in her service is a question not involved in this case. (*C. M. & St. P. R. R. Co. v. Ross*, 112 U. S., 377; *Corcoran v. Holbrook*, 59 N. Y. 519; *Pantzer v. Tillie F. Iron M. Co.*, 99 id. 368; *Hussey v. Coger*, 39 Hun, 639.)

FINCH, J. The verdict of the jury requires us to adopt the plaintiff's version of the facts, since the judgment was in his favor and the negligence of the master thereby established. If that judgment was against him alone very little question would arise, but it involves another owner, not on board the vessel but remaining at home, and so situated in his relation to the facts as to make necessary their careful consideration.

The barkentine upon which plaintiff was injured, while employed as mate, was owned by defendants. She was sailed by defendant Yates as master, on shares, by virtue of an agreement with the other owners to that effect. The agreement was not in writing, and is detailed solely by the two owners, each of whom testified to its existence. The vessel started on a voyage to Sagua la Grande, in Cuba, and when some distance at sea the plaintiff received an injury in the performance

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of his duty, which developed into an aneurism of the popliteal artery, causing him great pain, and largely incapacitating him for active service. The vessel was provided with a proper medicine chest, and no complaint is made that, before arriving at the port of destination, the master treated his mate otherwise than with kindness and care, and with such means as his limited knowledge and opportunity enabled him to use. But on reaching port and consulting a physician it was made apparent to the master that surgery and not medicine was needed to cure the injury. At this point of the case the contradictions become plentiful, but we must assume, in support of the verdict, that the doctor consulted disclosed the true nature of the disease; that he advised the removal of the injured man to the hospital, about fifteen miles distant, or at least to a suitable place on shore; that he pronounced it dangerous to carry the mate back to New York without an operation, if a delay exceeding twelve days was involved; that the plaintiff requested a removal to the hospital or to the shore with the provision usual in such cases and necessary to his support; but that the master refused these requests and kept him on board till the home voyage was begun and ended, and, more than twenty days after the doctor's warning, landed the mate in New York and placed him in a hospital where amputation became necessary because of the long delay and destructive progress of the disease. It is of little consequence to the liability of Yates whether he be regarded as master or owner, for in either character the negligence was his and drew with it a personal responsibility.

The maritime law is sensitive to the rights of seamen and sedulous for their protection. When sick or injured they are entitled to be cared for and cured at the expense of the ship, and not to be turned adrift in strange lands without adequate provision. They are exposed to hardship, confronted with dangers, and grow occasionally reckless by their very familiarity with peril. The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That

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which on land would be contributory negligence the maritime law scarcely recognizes and readily excuses, (*The City of Alexandria*, 17 Fed. Rep. 390, 395), and in many ways throws its protection around the seaman. When he falls sick or suffers injury the owners owe to him the duty of rendering such care and medical aid as circumstances permit, and in the performance of that duty the master stands as the agent and representative of the owners and his negligence is theirs. (*Petersen v. Swan*, 50 N. Y. Supr. Ct. 46; *The City of Alexandria*, *supra*; *Reed v. Canfield*, 1 Sumner, 195; *Harden v. Gordon*, 2 Mason, 541, 543.) The last cited case considers the effect of the act of Congress requiring the ship to be supplied with a suitable medicine chest, and holds that such requirement does not subvert the general duty imposed upon the owners by the maritime law, but merely regulates a single detail of its exercise. This duty the owners who remain at home and do not sail upon the ship can only perform, beyond supplying the medicine chest, through the master, who becomes their agent for its performance. The mate, although an officer, is a seaman. (*Holt v. Cummings*, 102 Pa. 212; *Ocean Spray*, 4 Sawyer, 105; *Minna*, 11 Fed. Rep. 759.) While both he and the master are servants of the owner and so fellow servants, they are not such in respect to the owners' duty to the seamen which the master performs in their behalf and as their representative, and the contention in this case that the master's neglect was that of a fellow servant cannot prevail.

Where the duty of the owner to the seaman is performed, the cost of nursing and medical attendance falls upon the ship, (*North America*, 5 Ben., 486), and that has been ruled even where the patient had been removed to his own house. (*Holt v. Cummings*, *supra*.) But where that duty is not performed, and the seaman suffers injury from the neglect, the ship, in a proceeding *in rem*., and the owners in a suit against them, are liable for the damages suffered. (*Couch v. Steel*, 77 Eng. Com. Law. Rep. 402; *Brown v. Overton*, 1 Sprague, 463; *Mosely v. Scott*, 14 Am. Law Reg. 599; *Tomlinson v. Hewett*, 2 Sawyer, 278; *Petersen v. Swan*, *supra*.) These principles

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settle the liability of Metcalf, unless he is discharged by force of his arrangement with the master, to which attention must now be directed.

There is very much of authority for the doctrine that where there is a charter of the vessel which strips the owner of all authority, possession and control, the charterer becomes owner *pro hac vice*, and the general owner ceases to be liable for the contracts or torts of the master, except for the wages of seamen. There seem to be limitations upon that doctrine and doubts about it, although the main drift of authority is in that direction. (*Hallet v. Columbian Ins. Co.*, 8 Johns. 272; *Thorp v. Hammond*, 12 Wall. 408; *Thomas v. Osborn*, 19 How. [U. S.] 22; *Reynolds v. Toppan*, 15 Mass. 370.) But I have arrived at the conclusion that this doctrine, even if broadly maintained, applies only to cases in which there has been an actual demise of the vessel, such as to take from the owner all possession, authority and control, and not to cases where there has been merely a contract about the vessel for the division of earnings and expenses. There are cases which may justly be cited as not in accord with that conclusion, (*Taggard v. Loring*, 16 Mass. 336; *Cutler v. Winsor*, 6 Pick. 335), but the current of authority in this State runs in its favor, and I am strongly convinced that it is sound in principle and just in its application. In *Hallet v. Columbian Insurance Company* (*supra*) there was an actual charter of the vessel, the owners receiving a stipulated price for its use. In *Thorp v. Hammond* (*supra*) the arrangement, although a letting on shares, is described by the court as, in effect, a chartering of the vessel and a surrender by the owner of all authority and control. The case was one of collision and largely affected by the terms and language of the act of Congress of 1851. In *Kenzel v. Kirk* (37 Barb. 113), where the vessel was let to the master on shares, he to provide supplies, it was ruled that there was not a "positive chartering," and the owners were liable for supplies to a vendor ignorant of the arrangement. In *Macy v. Wheeler* (30 N. Y. 241) it was said

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that the liability for supplies depends not on legal ownership but possession and control. In *Voss v. Cockcroft* (45 Barb. 58, 60) there was a written agreement that the master should sail the vessel on shares in the customary way, he to man and provision her, pay one-half of port charges and expenses and of extra labor, and have "as wages," one-half of the gross freight. This was held not to be a chartering of the vessel, and great force was given to the stipulation describing the master's share as "wages." In *McReady v. Thorne* (49 Barb. 438) there was a letting on shares, the master to victual, man and sail the ship at his own expense, pay port charges out of earnings and divide the balance equally with the owners. It was ruled that the master was not owner *pro hac vice*, and that the general owners were liable for unpaid port charges. A comparatively recent case in the English courts discusses the liability of the owner for the negligence of the master where the relations between them were much like those in the case at bar. (*Steel v. Lester & Lilee*, 3 L. R., Com. Pl. Div. 121.) Lester was owner and Lilee was captain. It was agreed between them that Lilee should sail the ship wherever he chose, be at liberty to take or refuse any cargo, engage and pay the men and furnish all requisite supplies, and give Lester one-third of the net profits. While the vessel was unloading at its port of destination, under a charter-party made by the master, the wharf was damaged by the sloop through the negligence of Lilee, and Lester was sued for the damages. The court decided that the arrangement did not amount to a demise of the vessel, and was not such an absolute parting with it as would sever the control. These authorities indicate a distinction which I am content to recognize between an actual demise of the vessel which transfers its possession, and all authority and control over it, and a mere arrangement for the sailing of the ship, which does not amount to a demise, and, therefore, leaves some possession, authority and control in the owner, although narrowed and restricted by the terms of the agreement. Unless there is an actual demise of the vessel which destroys the relation of master and owner, and substitutes that of bailor and bailee, the rela-

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tion must continue and the master remain servant and agent of the owner.

Now the arrangement between Yates and Metcalf was neither in form nor substance a demise of the vessel. The latter says that the captain sailed her on shares; that he, Metcalf, had nothing to do with the manning of the vessel or victualing of the crew, and nothing to do with hiring the seamen or paying the running expenses; that the freight paid expenses and the balance was divided up. The master testified, "I had an agreement with the owners to sail freight on what is known as shares, that is I have half of the gross stock of earnings of the vessel, and pay for the victualing and manning of the vessel, and pay the tonnage out of my part of the gross earnings;" and he added that the owners had nothing to do with hiring the seamen, victualing them or furnishing supplies. This seems to me but a mode of paying the master for his services. It was not said that he should dictate the voyages, decide as to cargo, fix rates of freight and absolutely control the vessel to the exclusion of Metcalf. Indeed it appears that she was consigned to Metcalf, and that he exercised some authority over her. His dividend from her earnings was increased by the very saving of expenses which the master effected at the risk and to the injury of the mate, and I am unable to resist the conclusion in spite of the very learned and interesting argument for the appellants, that the judgment was correctly given against both the owners.

The judgment should be affirmed.

All concur.

Judgment affirmed.

**PATRICK WALSH, Respondent, v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK et al., Appellants.**

Under and by the provisions of the acts under which the New York and Brooklyn Bridge was constructed (Chap. 399, Laws of 1867; Chap. 601, Laws of 1874; Chap. 300, Laws of 1875), the bridge belongs to the two cities of New York and Brooklyn, the trustees thereof are their agents, and those employed by the trustees are the agents and servants of the cities, for whose careless and negligent acts in performing the duties of their employment the cities are liable.

(Argued October 4, 1887; decided October 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 20, 1886, which affirmed an interlocutory judgment herein entered upon an order overruling a demurrer to plaintiff's complaint. (Reported below, 41 Hun, 299.)

The pleadings are set forth in the opinion.

David J. Dean for appellants. The trustees of the New York and Brooklyn Bridge, not being the agents of the mayor, aldermen and commonalty of the city of New York, the last named corporation is not the superior of the laborers in the employment of the said trustees, and is not responsible for the negligent acts or omissions of such laborers. (Laws of 1867, Chap. 399, p. 948; Laws of 1874, Chap. 601; Laws of 1875, Chap. 300.) The legislature has power thus to establish new civil divisions for special purposes, and to define the duties and obligations of the officers of such divisions. (*People v. Draper*, 15 N. Y. 532; *Met. Bd. Health v. Heister*, 37 id. 667; *People ex rel. Mullin v. Sheperd*, 36 id. 285.) The defendants do not bear such a relation to the negligent laborer as to become liable for his act or omission, under the principle *respondeat superior*. (*Maximillian v. Mayor, etc.*, 62 N. Y. 163; *Pack v. Mayor, etc.*, 8 id. 222; 2 Dillon on Corp. § 974; *Mayor v. Bailey*, 2 Den. 433, 437; *Walcott v. Swampscott*, 1 Allen, 101; *White v. Phillipston*, 10 Metc. 108; *Hafford v.*

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Bedford, 16 Gray, 297; *Riggs v. Foote*, 4 Allen, 195, 197; *Buttrick v. Lowell*, 1 id. 172; *Kimball v. Boston*, id. 417; *Child v. Boston*, 4 id. 41, 52; *Morrison v. Lawrence*, 98 Mass. 219; *Russell v. Mayor, etc.*, 2 Den. 481; *Fisher v. Boston*, 104 Mass. 87; *Ham v. Mayor, etc.*, 70 N. Y. 459; *N. Y. & B. S. M. Co. v. Brooklyn*, 71 id. 580. The defendants are not liable for the negligence of the trustees or of their employes. (*Martin v. Mayor, etc.*, 1 Hill, 545; *Lorillard v. Town of Monroe*, 11 N. Y. 392, 396; *Bk of Comm. v. Mayor, etc.*, 43 id. 184; *Atwater v. Baltimore*, 31 Md. 462; *Hafford v. City of N. Bedford*, 82 Mass. 297; *Fisher v. Boston*, 104 id. 87; *Walcott v. Swampscott*, 83 id. 101; *Buttrick v. Lowell*, id. 172; *Terry v. Mayor, etc.*, 8 Bosw. 504; *Russell v. Mayor, etc.*, 2 Den. 473, 481; *Maximilian v. Mayor, etc.*, 62 N. Y. 162, 169; *Ham v. Mayor, etc.*, 70 id. 461; *Heiser v. Mayor, etc.*, 104 id. 71; *Tone v. Mayor, etc.*, 70 id. 157.) If it be conceded that the trustees are agents of the two cities, yet the municipal corporation is not held liable in damages for the negligent act of a person employed by them, because the duties imposed by the statutes in relation to the bridge are of a governmental or public character imposed for the public, or general (not corporate) benefit. (1 Dillon on Mun. Corp. [3d ed.] 88, § 66; 2 id. 968; *Bailey v. Mayor, etc.*, 3 Hill, 531; 2 Denio, 433, 446; *O'Meara v. Mayor, etc.*, 1 Daly, 425; *Richmond v. Long*, 17 Gratt. 375; *Sherbourn v. Yuba*, 21 Cal. 113; *Oliver v. Worcester*, 102 Mass. 489, 499; *Detroit v. Corey*, 9 Mich. 165; *Bigelow v. Randolph*, 14 Gray, 544; *Eastman v. Meredith*, 36 N. H. 284; *Murphy v. Com'rs*, 28 N. Y. 142; Story on Agency, § 319; *Whitfield v. Lord de Spencer*, Cowp. 343.) No liability falls on the city for malfeasance of such a duty as is imposed in the case. (*Russell v. Mayor, etc.*, 2 Den. 461; *Lorillard v. Monroe*, 11 N. Y. 392; *Ham v. Mayor, etc.*, 70 id. 459; *Maximilian v. Mayor, etc.*, 62 id. 162, 164; *Smyth v. Rochester*, 76 id. 506; *N. Y. & B. S. M. Co. v. Brooklyn*, 71 id. 580; *McKay v. Buffalo*, 9 Hun, 401; 74 N. Y. 610; *Donovan v. Bd Edn.* 85 id. 117; *Morey v. Town of Newfane*,

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8 Barb. 654; *Ensign v. Supervisors*, 25 Hun, 20; *N. Y. & B. S. M. Co. v. Brooklyn*, 71 N. Y. 583.)

Charles J. Patterson for respondent. A public officer who cannot be controlled in the performance of his duty or discharged by the municipality is often its agent, so that it must answer for wrongs committed by him or his subordinates. (*Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Barnes v. Columbia*, 91 U. S. 540; 76 N. Y. 475.) Assuming that the trustees are the agents of the cities, the case is the same as though the latter engaged directly in the work, and they would be liable for the cause of action stated in the complaint. (*Bailey v. Mayor, etc.*, 3 Hill, 531; 2 Den. 433; *Mersey Docks v. Gibbs*, 11 H. of L. 686; *Scott v. Manchester*, 2 H. & N. 204; *Childs v. Boston*, 4 Allen, 41; *Hand v. Brookline*, 126 Mass. 324.)

EARL, J. The following is a copy of the plaintiff's complaint in the action :

"That now, and at all times hereinafter mentioned, the defendants were, and each of them was, a domestic municipal corporation, duly incorporated under the laws of this State, for the municipal government of the cities of New York and Brooklyn, in this State, respectively.

That, on the 12th day of May, 1883, said defendants were engaged in the construction of a work known as the New York and Brooklyn Bridge, through their agents and officers who were known as the trustees of the said New York and Brooklyn Bridge, which said bridge was intended to and did span the waters of the East river, and connect the two cities aforesaid.

Said defendants, acting through the said trustees as their agents, as aforesaid, employed a certain laborer to labor for them in the construction of the said bridge, and while said laborer was so doing, and acting within the scope of his employment for said defendants, he carelessly and negligently let fall from the said bridge a heavy plank of wood, which, being allowed to fall as aforesaid, struck the plaintiff upon the foot as he was passing over Water street, a public highway in

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the city of New York, beneath said bridge, whereby the bones of his foot were broken, and it was otherwise severally injured and bruised, and he was made ill and lame and prevented from attending to his business, to his damage in the sum of \$10,000, all of which happened without fault or neglect on the plaintiff's part.

At least thirty days before the commencement of this action the claim of the plaintiff upon which this action is founded was presented to the comptroller of the city of New York, and also to the chief fiscal officer of the city of Brooklyn, separately, in writing, and duly verified, and each of said officers have neglected and refused to make an adjustment or payment thereof for more than thirty days after such presentment.

Wherefore, said plaintiff demands judgment against the defendant for \$10,000, and the cost of this action."

To this complaint the mayor, aldermen and commonalty of the city of New York demurred, on the ground that it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action. The issue of law formed by the demurrer was brought to argument at a Special Term of the Supreme Court and the demurrer was overruled, and an interlocutory judgment was ordered for the plaintiff, The Mayor, etc. of New York then appealed to the General Term and there the order was affirmed, and this appeal was then brought. The contention of the appellants is that the trustees of the New York and Brooklyn Bridge are not the agents of the city of New York, and that the city, therefore, is not the superior of the laborers in the employment of the trustees, and not responsible for their negligent acts and omissions.

The New York and Brooklyn Bridge was constructed under the acts, chapter 399 of the Laws of 1867, chapter 601 of the Laws of 1874, and chapter 300 of the Laws of 1875. In section 1 of the latter act it was provided that the bridge should be completed and managed "for and on behalf of the cities of New York and Brooklyn as a consolidated district for that purpose." As was said by us in *People ex rel. Murphy v.*

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Kelly (76 N. Y., 475, 489), it is not perceived for what purpose the language "as a consolidated district" found in the act of 1875 was inserted. It certainly has no bearing upon this discussion and adds nothing to the force of the other language used. The bridge was to be completed and managed on behalf of the two cities jointly. Section 3 of the same act provides that the bridge "shall be a public work to be constructed by the two cities." The two cities in the proportions mentioned in the act were to furnish all the funds for the construction of the bridge. The trustees of the bridge were to be appointed by the city officials of the two cities. All the real estate purchased by the trustees was to belong to the two cities jointly, and the bridge and all its appurtenances, and all the property connected with it was to belong absolutely to the two cities in shares to each of the cities equal to the amount paid by them for the construction of the bridge and for the land and appurtenances thereof. All the revenues of the bridge were to belong to the two cities and were to be used for the payment of the indebtedness created by the cities for its construction. As the bridge is the property of the two cities, any revenue derived therefrom, after the payment of debts created for the construction thereof, would go into the treasuries of the two cities. So in every sense and in every view the bridge was constructed and is managed for the two cities, and the trustees appointed by the city officials represent the two cities as their agents. Hence they and the persons employed by them are the agents and servants of the cities for whose careless and negligent acts they are liable. (*Ehrgott v. Mayor, etc.*, 96 N. Y. 264.) This conclusion we think is rendered necessary by our prior decisions in the case of the *People ex rel. Murphy v. Kelly* (*supra*), and in the case of this plaintiff for this same accident against the trustees of the New York and Brooklyn Bridge (96 N. Y. 427).

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

THE PEOPLE ex rel. FISK WALLACE, Respondent, v. THOMAS C. ABBOTT et al., Trustees, etc., Appellants.

A judgment recovered against the trustees of a school district, upon a contract entered into by them on behalf of the district, binds them individually, and may be collected by execution out of their individual property. (Code Civ. Pro. §§ 1927, 1929, 1931; Laws of 1864, Chap. 555, Tit. 18, §§ 6-11.)

Where the action is defended, without any resolution of a district meeting, no obligation rests upon the district to indemnify the trustees for costs, charges and expenses until a district meeting shall have found in favor of the claim and voted that a tax be assessed and collected for its payment, or unless, on appeal from a refusal of the meeting to vote a tax, it shall be decided that the account in whole or in part ought justly to be charged upon the district.

Where, therefore, an action was brought against school trustees to recover the salary of a teacher, which was defended by them without direction or instruction of a district meeting, and judgment was recovered against them, which was affirmed on appeal, *held*, that, in the absence of any action on the part of the district at any district meeting, or application by the trustees to the county judge to have the costs and expenses allowed, a writ of *mandamus* was improperly issued directing the trustees to forthwith pay the costs embraced in the judgment, or deliver to the plaintiff in the action an order on the collector of the school district for the amount thereof.

(Argued October 4, 1887; decided October 18, 1887.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 1, 1887, which affirmed an order of Special Term directing the issuing of a peremptory writ of *mandamus* directed to defendants, as trustees of school district No. 6, of the town of Gravesend, commanding them forthwith to pay to the petitioner or his attorney the costs included in a judgment obtained against them by the petitioner in an action brought by him to recover his salary, as a teacher, under a contract between him and said trustees, also costs on appeal from the judgment.

The facts, so far as material, are stated in the opinion

T. C. Cronin for appellants. The ordinary and usual ways for the collection of damages should be resorted to, and not

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the extraordinary and forbidden ways urged upon the court in this special proceeding. (*People v. Coffin*, 7 Hun, 608; *People v. Bd. of Apportionment*, 64 N. Y. 627; *People v. Campbell*, 72 id., 496; *People v. Dowling*, 55 Barb. 197; *Clark v. Miller*, 54 N. Y. 528.) The law of the State should be followed and the collection made of the trustees as provided by law. (Code, §§ 1931, 3244.) Legal remedies for the recovery of the damages must be taken, and no *mandamus* will lie where the remedy is complete on the judgment for damages. (*People v. Green*, 5 W. Dig. 44; Code, § 1931.) The certificate of the county judge, under date of April 1, 1886, controls on the question of costs, and no costs of any kind, made and ordered by any court at any time, in any stage of the case, can, under said certificate, be recovered of the defendants as public officers. (*Clark v. Tunnickliff*, 38 N. Y. 58; *People v. Eckler*, 19 Hun, 609.) The compulsory jurisdiction of the State superintendent of public instruction is complete by statutory requirements, and absolute and without official excuse by the superintendent. (Act of 1864, Consolidated, Code Public Instruction, 74, § 7; Laws of 1878, Chap. 174.)

Tunis G. Bergen for respondent. The refusal of the trustees to pay Wallace damages for a breach of implied contract would not support an appeal to the superintendent. (Laws of 1864, Chap. 555, Tit. 12; R. S. [7th ed.] 1186, § 1, subds. 1, 4; Code Public Instruction [ed. 1879], 523, 374; *People v. Eckler*, 19 Hun, 609.)

ANDREWS, J. The relator has mistaken his remedy. A judgment for costs recovered against the trustees of a school district in their official character binds the trustees individually, and may be collected by execution out of their individual property. (Code Civ. Pro. §§ 1927, 1929, 1931.) It was the same under the Revised Statutes (2 R. S. 476, § 108.) It is not a judgment against the school district, but it may, under some circumstances, constitute a

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district charge, to be paid by a tax on the district. The subject is now regulated by the statute (Chap. 555 of the Laws of 1864, Tit. 13, §§ 6-11.) It will appear by reference to those sections that where the action is brought or defended by the trustees of a school district by instruction of a district meeting, the costs and expenses incurred by the trustees and all costs and damages adjudged against them in the action, is made a district charge which "shall be levied by tax." (§ 7.) Where the action is brought or defended without any resolution of a district meeting, no obligation rests upon the district to indemnify the trustees for costs, charges or expenses, until a district meeting shall have found in favor of the claim and voted that a tax be assessed and collected for its payment, or unless on appeal to the county judge from the refusal of the district meeting to vote a tax, it shall be decided that the account in whole or in part ought justly to be charged on the district. (§§ 8, 9, 10.) The relator brought an action against the trustees of school district No. 6, town of Gravesend, to recover the unpaid part of a year's salary, under an alleged contract of employment for that period made between him and the trustees. The trustees in their answer put in issue the alleged contract. The relator recovered judgment in the action for \$748.97 damages and costs, the costs in the judgment constituting about one-half the amount. There was so far as appears no direction or instruction of a district meeting that the trustees should defend the action, nor has the district in any way assumed any liability for the costs embraced in the judgment, nor has any application been made by the trustees to the inhabitants of the district to have the costs and expenses audited or allowed. The relator seeks to enforce by *mandamus* the payment of the costs in the judgment, out of funds of the district in the hands of, or under the control of the trustees. They have offered and stand ready to pay the damages awarded in the judgment. It is clear that the school district cannot, under the circumstances disclosed, be compelled to pay the costs awarded against the trustees. The relator has a personal judgment therefor, against

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the individual trustees, and the papers show that he has issued execution thereon, but whether it has been returned does not appear. It is unnecessary to determine whether the relator is entitled to retain his judgment for costs, in view of the certificate granted by the judge after the costs had been taxed and the judgment entered. But to enforce the payment of the costs out of the funds of the district, would subject the district to a claim for which, as the case stands, it is in no way liable. The scheme of the statute is to make the trustees of school districts individually liable upon contracts entered into in behalf of the district. For the purpose of the remedy by action they are treated as the individual contracts of the trustees. The district in certain cases is bound to indemnify the trustees. But the district owes no duty either to the trustees or to the other party to the litigation, to pay the costs of a litigation undertaken or carried on without its direction, until they shall have been audited and allowed in the manner pointed out by the statute.

The order of the Special and General Terms should therefore be reversed, and the proceeding dismissed.

All concur.

Ordered accordingly.

BERTHA LAUBHEIM, Appellant, v. DE KONINGLYKE NEDER
LANDSCHE STOOMBOT MAATSCHAPPY, Respondent.

As to whether, in the absence of a statutory requirement, a steamship company owes a duty to its passengers to provide a surgeon to care for them in case of sickness or accident, or as to whether having voluntarily assumed that duty its position becomes identical with that of a carrier upon whom the duty is imposed by law, *quære*

Where by law or by choice the company has become bound to furnish such an officer, reasonable care and diligence in the selection of a person reasonably competent is all that is required, and it is liable only for a neglect of that duty. It is not compelled to select and employ the highest skill and longest experience.

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Accordingly *held*, that in the absence of evidence of any carelessness or negligence on the part of a steamship company in its selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon.*

(Argued October 5, 1887; decided October 18, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 5, 1885, which affirmed a judgment in favor of defendant entered upon an order dismissing the complaint on trial. (Reported below, 19 J. & S. 467.)

This action was brought to recover damages for injuries caused by alleged negligence.

The plaintiff, in August, 1885, was a steerage passenger on one of the steamships belonging to defendant, plying between Rotterdam and New York. When at sea she fell on the deck of the vessel and fractured the knee-cap of one knee. She was taken in charge by the ship surgeon and, as was claimed, was treated so unskillfully and negligently that after she landed it became necessary to amputate the leg. It was proved that the ship surgeon had been on the defendant's steamboats for several years, and for his services received a salary from the defendant annually and a certain sum for each passenger carried.

A. *Blumenstiel* for appellant.

S. W. *Rosendale* for respondent. The defendant in any event could only be held liable for negligence in knowingly selecting or retaining an incompetent surgeon. (A. L. J., 178, 179; *Loftus v. U. F. Co.*, 84 N. Y. 455; *Hubbell v. Yonkers*, 104 id. 434-9; S. & Redf. on Neg. § 280; *Hillis v. C., R. I. & P. R. R. Co.*, 36 A. L. J. 196; 20 Am. L. Rev. 635, 641, 643; *Secord v. St. P. R. R. Co.*, 18 Fed. Rep. 221; *McDonald v. Hospital*, 120 Mass. 432-6; *Chapman v. E. R. Co.*, 55 N. Y. 579.) For error of judgment there is no liability on the part of the surgeon. (S. & Redf. on Neg. § 440.) The presumption is

* NOTE. — The injury complained of in this case occurred prior to the passage of the act of congress of August 3, 1882, imposing upon steamboat companies the duty to provide physicians or surgeons.

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always in favor of the competency of the physician. (McClelland's Civ. Malp. 295.)

FINCH, J. It is not necessary in this case to determine whether, at the date of the accident to the plaintiff, the steamship company owed a duty to its passengers to provide a surgeon for their care and safety in the emergency of sickness or accident, or whether having voluntarily assumed that duty its position became identical with that of a carrier bound by law to furnish such an officer, since either proposition may be granted without involving error in the judgment rendered.

If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. (*Chapman v. Erie R. Co.*, 55 N. Y. 579; *McDonald v. Hospital*, 120 Mass. 432; *Secord v. St. Paul R. R. Co.*, 18 Fed. Rep. 221.) It is responsible solely for its own negligence and not for that of the surgeon employed. In performing such duty it is bound only to the exercise of reasonable care and diligence and is not compelled to select and employ the highest skill and longest experience.

There was no evidence in this case that the defendant was careless or negligent in its choice. The surgeon selected had been upon the Rotterdam line for three years, and so far as appears, was reasonably competent for his duty. If in plaintiff's case he erred in his treatment it does not prove that he was incompetent, or that it was negligence to appoint him. This case shows that one doctor, of high reputation, may deem it unwise ever to wire a broken knee-cap, while another of equal ability thought it prudent to try the experiment. The experts, called for the plaintiff, decline to say that the ship's doctor subjected the injury to bad treatment, taking into view the inconveniences of a tossing ship and the impossibility of giving absolute rest to the limb. This branch of the plaintiff's case failed and the trial court was justified in a dismissal of the complaint.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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ISAAC R. PHARIS, Appellant, v. R. NELSON GERE, Respondent.

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To give this court jurisdiction to review a decision of the General Term, reversing a judgment and granting a new trial in an action tried by a jury, the General Term order must show the facts conferring the jurisdiction. It is sufficient to render a consideration of the appeal impossible that the General Term may have reversed upon a question of fact.

The record on appeal from such an order contained a recital, immediately following the statement of rendition of the verdict, that "the court thereupon denied the motion of the defendant for a new trial upon the minutes." Following this was a formal order stating the making of a motion for a new trial on the minutes, and that "said motion be and the same is hereby denied." Then followed an order of the General Term, which recited an appeal from the order denying the motion for a new trial, and from judgment, and reversed both the order and the judgment and granted a new trial. The case also disclosed that there were disputed questions of fact. On appeal from the General Term order, *held*, that said court had jurisdiction of the questions of fact, and it was to be assumed that its order was based upon some one of the grounds mentioned in the provision of the Code of Civil Procedure (§ 999), in reference to motions for new trial on the minutes, and as it could not be said that the reversal was not upon a question of fact the order was not reviewable here.

It seems, an order denying a motion for a new trial made on the minutes should state the grounds on which the motion was made. If it does not the General Term may affirm or refuse to hear an appeal therefrom until the order is corrected by stating the question passed upon by the trial court.

The General Term, however, may entertain such an appeal; and where it does, and the questions are argued and submitted to it, and it reverses the order and grants a new trial, it must be assumed its decision was based on some one of the grounds embraced in said provision; and where the case presents disputed questions of fact, it may not be said that the reversal was not on such a question.

(Argued October 12, 1887; decided October 18, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made May 15, 1885, which reversed a judgment in favor of plaintiff herein, and reversed an order denying a motion for a new trial, and ordered a new trial.

The facts appear sufficiently in the opinion.

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Louis Marshall for appellant. This appeal brings up for review these judgments only, and not the order denying the motion for a new trial, as no jurisdiction was conferred upon the General Term to review that order. (*People v. Fowler*, 55 N. Y. 675; *Batterman v. Finn*, 40 id. 340; *In re Larson*, 96 id. 381; *Fiester v. Sheppard*, 92 id. 251; *Wright v. Hunter*, 46 id. 309; *Thurber v. Harlem Edg. Co.*, 60 id. 326; *Boos v. W. Mut. L. Ins. Co.*, 64 id. 236; *Third Ave. R. R. Co. v. Ebling*, 100 id. 98; *Whitehead v. Kennedy*, 69 id. 462; *Tinson v. Welch*, 51 id. 244; 87 id. 110; *Newhall v. Appleton*, 46 N. Y. Supr. Ct. 6; *Argall v. Jacobs*, 56 How. Pr. 167; 21 Hun, 114; *De Luce v. Kelly*, 5 N. Y. W. Dig. 32; 75 N. Y. 608; *Cook v. Leonard*, 17 N. Y. W. Dig. 575; *Gray v. Floating El. Co.*, 13 id. 140; *Hinman v. Stillwell*, 34 Hun, 178; *Coakly v. Mahar*, 36 id. 157; *Alfaro v. Davidson*, 7 J. & S. 463, 466; 8 id. 39; *McAler v. Corning*, 17 id. 522; *Dodge v. Mann*, 85 N. Y. 643.) This court has jurisdiction to review the questions of law because the General Term had not the power to review the questions of fact. (*Sands v. Crook*, 46 N. Y. 564; *Wright v. Hunter*, id. 412; *Dickson v. B. & Seventh Ave. R. R. Co.*, 47 id. 507; *Courtney v. Baker*, 60 id. 1; *Harris v. Burdett*, 73 id. 136; *Snebly v. Conner*, 78 id. 218; *Bronk v. N. Y. & N. H. R. R. Co.*, 95 id. 656; *De Luce v. Kelly*, 75 id. 608; *Dodge v. Mann*, 85 id. 643; *Tinson v. Welch*, 51 id. 244; *Hinman v. Stillwell*, 34 Hun, 178.)

George F. Comstock for respondent.

EARL J. There were several questions of fact litigated upon the trial of this action and submitted to the jury, and they rendered a verdict in favor of the plaintiff. The defendant made a motion for a new trial upon the minutes of the trial judge, which was denied. Subsequently a judgment was entered upon the verdict, and then the defendant appealed from the order denying the motion for a new trial and from the judgment to the General Term, where both the order and judgment were reversed and a new trial was granted. The plaintiff then appealed to this court giving the usual stipulation.

Opinion of the Court, per EARL, J.

It is conceded by the learned counsel for the appellant that this court has no jurisdiction to hear this appeal provided the General Term may have granted a new trial upon a question of fact, and so we have frequently held. (*Wright v. Hunter*, 46 N. Y. 409, 412; *Harris v. Burdett*, 73 id. 136, and other cases.) But he claims that this case was not so before the General Term, that it could reverse the order and judgment upon a question of fact, and in this we are constrained to differ with him.

Section 999 of the Code of Civil Procedure provides that the judge presiding at the trial by a jury, may, in his discretion, entertain a motion made upon his minutes at the same term to set aside the verdict and grant a new trial upon exceptions, or because the verdict is for excessive or insufficient damages or otherwise contrary to the evidence or contrary to law. It is not required that written notice of the motion for a new trial upon the judge's minutes should be given. It may be brought on immediately after the rendition of the verdict without any previous notice. But it can be based only upon one of the grounds mentioned in the section, and must be heard upon the minutes only. In the argument of the motion the ground upon which it is based will necessarily be disclosed and the order entered upon the motion should, with propriety, always state the ground or grounds upon which the motion was made. If it do not, and the order be one denying a motion for a new trial and an appeal be taken therefrom to the General Term, it would usually be impossible for the appellate court to know upon what ground the motion for a new trial was based and what questions were before the trial judge for consideration. For aught that appears in such a case the motion may have been upon an untenable ground, and hence the General Term could with propriety refuse to hear such an appeal, certainly, unless all the grounds for a new trial mentioned in section 999 existed, which would be very unusual. It could affirm such an order appealed from, or refuse to hear the appeal until the order should be corrected by stating the question passed upon by the trial judge. But

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we do not perceive why the General Term may not entertain such an appeal, and when it does and the questions are argued and submitted to it for determination, and it reverses the order and grants a new trial, then a different state of things exists. In such case it must be assumed that its order was based upon some one of the grounds mentioned in the section referred to, and where the case presented disputed questions of fact, it cannot be said that the reversal was not upon a question of fact. Hence upon an appeal from such an order to this court, as the reversal may have been upon a question of fact, there is nothing for us to review.

Now what appears in this record? First, there is a recital immediately after the rendition of the verdict that "the court thereafter denied the motion of the defendant for a new trial upon the minutes," and then a formal order denying the motion appears to have been entered in these words, "a motion being made at this term of court by and on behalf of the defendant in this action for a new trial thereof, upon the minutes, now, after hearing George N. Kennedy, Esq., of counsel for defendant in behalf of said motion, and W. P. Goodelle, Esq., and Louis Marshall, Esq., in opposition thereto, and after due deliberation had thereon, it is ordered that said motion be and the same is hereby in all things denied." It thus appears that the motion was made to the court and formally argued, and after due deliberation had thereon was denied. It must be assumed that it was argued upon the merits, and, as the motion for a new trial was made upon the minutes, that it was based upon some one of the grounds mentioned in section 999. From that order the defendant appealed to the General Term. Subsequently judgment was entered, and then defendant also appealed from the judgment to the General Term. Then there is the order of the General Term which recites the appeal from the order denying the motion for a new trial and from the judgment, and that they have been duly brought on for argument, and reverses both the order and the judgment and grants a new trial. The General Term did take jurisdiction of the appeal from the

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order of the trial judge. It did not refuse to hear the appeal for the reason that the order did not state upon what ground the motion for a new trial was based. It heard the parties, and, as we must assume, considered the case and decided the appeal upon its merits. It must have reversed the order upon some of the grounds mentioned in section 999, but upon which ground it is impossible from this record to determine. It is sufficient to render it impossible for us to consider the appeal that the General Term may have reversed the order and granted a new trial upon a question of fact.

If the case was so disposed of at the General Term as to give this court jurisdiction to review its determination, its order should show the facts which confer the jurisdiction, and it may be possible for the appellant yet to procure the order to be so amended. Our order, therefore, is that this appeal be dismissed with costs, that the new trial ordered by the General Term be had, unless the appellant shall at the first General Term held in the fourth department, procure the order of reversal to be so amended as to give this court jurisdiction to hear the appeal, in which event the case is to retain its place on the present calendar and be argued at a time to be agreed upon by counsel.

All concur except RUGER, Ch. J., not sitting.

Ordered accordingly.

THE PEOPLE ex rel. JOHN McMACKIN et al., Appellants, v.
THE BOARD OF POLICE OF THE CITY OF NEW YORK,
Respondent.

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The remedy by writ of *mandamus* may only be resorted to where a clear legal right is made to appear and there is no other adequate or legal means to obtain it.

When asked against public officers to compel the performance of an alleged public duty, the granting or refusing of the writ is somewhat a matter of discretion.

The relators, claiming to represent the United Labor Party of the city of New York, which party they allege polled more than fifty thousand

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votes at "the next preceding election," on proof that the board of police had refused to appoint inspectors of election of the political faith and opinion of that party as required by the amendment of 1887 (Chap. 490, Laws of 1887), of the consolidation act, applied for a peremptory writ of *mandamus* to compel such appointment which was denied. The record on appeal to this court showed that two other organizations claimed to be the sole and proper representatives of the voters who deposited the votes in question and that they were entitled to the additional inspectors. *Held*, that the writ was properly denied; that in the exercise of a legal and proper discretion, upon being satisfied from the record that there was an honest dispute as to material facts which should be determined, the court was justified in refusing a peremptory writ, although the issues were in a strict and technical construction of the papers inartificially or loosely made up.

An alternative writ was granted, to which two of the four members of the board made a return, the other two refusing to join therein. *Held*, that the return was properly received and entertained; that the court would not be driven into issuing a peremptory writ to guide the conduct of public officers charged with a public duty upon any narrow construction of a return to its alternative writ, where from all the papers it is seen that there is a substantial and material issue of fact.

(Argued October 17, 1887; decided October 25, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 10, 1887, which overruled a demurrer interposed by the relators to returns made to an alternative writ of *mandamus*; also appeal from said order, which, in addition to directing judgment, denied a motion to strike out a return made by two members of the Board of Police, defendant, and affirmed an order of Special Term denying a motion, made on return of an order to show cause for a peremptory writ of *mandamus*.

The relators, who claimed to be the representatives of the "United Labor Party," alleged in their petition in substance that said party at the next preceding election had nominated Henry George as its candidate for mayor in the city of New York, who received 68,110 votes; that the Board of Police had appointed four inspectors of election to represent the Democratic and Republican parties, and determined that said United Labor Party was not entitled to one of them; that said party

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thereupon designated one of the board to select one additional inspector in each election district of the political faith or opinion of said party; that said member made and filed such an appointment with the board, but the board declined and refused to appoint the inspectors so selected. The relators asked for a peremptory writ directing the board to make the appointment. Upon the return of the order to show cause, papers were produced showing that two other organizations, Irving Hall and the Progressive Labor Party, claimed to represent the voters who cast their ballots for George and claimed to be entitled to the additional inspector.

The Special Term denied the application for a peremptory writ, but issued an alternative one; on the return day of the alternative writ the Board of Police filed as its return a copy of all the proceedings before the board, from which it appeared that on all motions a tie vote had been cast. The relator demurred to this return. Thereupon two of the commissioners asked leave to file an additional return the other two refusing to join therein. This was granted and the return filed. The relator moved to disregard and strike it from the files; this was denied. The relator then demurred to it for insufficiency. The court overruled the demurrer and directed judgment for the defendant.

Further facts appear in the opinion.

Edward M. Shepard for appellant. The general rule is that the granting of a *mandamus* is a matter of judicial discretion; but "it is not an absolute or arbitrary discretion, but is to be exercised under, and may be regulated and controlled by legal rules, and the exercise of the discretion is reviewable here." (*People ex rel. Gas-light Co. v. Syracuse*, 78 N. Y. 56, 61.) The provision of section 2070 of the Code, "that a peremptory writ of *mandamus* may be issued in the first instance, where the applicant's right to the *mandamus* depends only upon questions of law," is in keeping with the conventional language so long used treating the issuance of a *mandamus* as a matter of discretion. (*In re Sage*, 70 N. Y. 220;

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People ex rel. Lanney v. Campbell, 72 id. 496; *People ex rel. Faile v. Ferris*, 76 id. 326.) The statute in this case imposed on the police board an absolute duty to be exercised for public reasons of the gravest character. (*State v. Doyle*, 40 Wis. 220; *People ex rel. Gas-light Co. v. Syracuse*, 78 N. Y. 56; *People ex rel. Millard v. Chapin*, 104 id. 96.) This court has entertained and decided upon their merits appeals from orders refusing and granting peremptory writs in the first instance, where the facts were undisputed in several cases. (*People ex rel. Hartford Co. v. Fairman*, 91 N. Y. 385; *People ex rel. Portchester B'k v. Cromwell*, 102 id. 477; *People v. Rome, etc., R. R. Co.*, 103 id. 95; *People ex rel. Millard v. Chapin*, 104 id. 96; *People ex rel. Ostrander v. Chapin*, 105 id. 309; *People ex rel. Otsego B'k v. Super's*, 51 id. 401.) The language of section 2070 of the Code imposes a legal duty upon the court at Special Term, especially in those cases where the *mandamus* is asked to enforce a public right. (*Newburgh T. Co. v. Fuller*, 5 Johns. Ch. 111; *Alderman Blackwell's Case*, 1 Vern. 152; *Phelps v. Hawley*, 52 N. Y. 27; *People ex rel. Conway v. Supers.*, 68 id. 119; *People v. Supers. of O. Co.*, 51 id. 401; *Hutson v. Mayor, etc.*, 9 id. 168.) By making return any objection to the form of the alternative writ was waived. (High on *Mandamus*, § 452.) The return of the police board to the alternative writ raised no issue of fact. The relator's demurrer to the return should have been sustained, and a peremptory *mandamus* should have been awarded against the board. (High on Extraordinary Remedies, § 464; *People v. Supers. of S. Co.*, 56 N. Y. 249; *Society v. Comm.*, 52 Penn. 125; *Comm. v. Comrs.*, 37 id. 277.) The return was inadmissible for any purpose, and should have been disregarded, and upon the motion made by the relators, should have been stricken from the files. (*Rex v. Abingdon*, 12 Mod. 308; High on *Mandamus*, § 480; *People v. Supers. of San F.* 27 Cal. 655.) When the duty, the performance of which is sought, is obligatory upon municipal officers as a body without regard to the persons composing such body, the names of the individual officers may be treated as surplusage. (High

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on *Mandamus*, § 443; *People v. Champion*, 16 Johns. 61; *Sheaff v. Colwell*, 87 Ill. 189; *Nevada v. Wright*, 10 Nev. 167; *City Council v. Hickman*, 57 Ala. 338; *King v. Baily*, 1 Keble, 33; *People v. Supers.* 27 Cal. 655.) If the demurrers should be held bad, the relators should have leave to withdraw them. No traverse was necessary, as was supposed by the General Term. (Code, § 2079; *People v. Order of American Star*, 53 Super. Ct. 66.)

E. Ellery Anderson for respondent: The right of the relators to a peremptory writ depends upon the trial of a meritorious issue of fact. The peremptory writ can only issue in the first instance, when the relator's right depends solely on questions of law. (*People ex rel. v. Cromwell*, 102 N. Y. 477; *People ex rel. v. Super. of W. Co.*, 73 id. 173; *People ex rel. v. Richard*, 99 id. 620.) The return of the board of the police is sufficient to raise the issue of fact presented in this case. (Code, §§ 2076, 2077, 2079, 2082.) The refusal of the writ rests in the sound discretion of the court. (*People ex rel. v. Ferris*, 76 N. Y. 326; *People ex rel. v. Campbell*, 72 id. 496; *Sage v. L. S. & S. R. R. Co.*, 70 id. 220; *In re Dederick*, 77 id. 595.)

PECKHAM, J. The remedy by *mandamus* is of an exceptional character, and the writ issues only in that class of cases where a clear legal right is made to appear and there is no other adequate and legal means to obtain it. The granting or refusing the writ, especially where it is asked against public officers to compel the performance of an alleged public duty, is somewhat a matter of discretion.

These principles are elementary and require the citation of no authorities for their support.

In the proceeding at bar the writ is not asked for to establish or maintain any private right or interest, but the relators ask that it shall issue against a board of public officers to compel the performance by it of what the relators allege to be a public duty. They claim to be the representatives of a constituency of over 50,000 voters in New York city, and they

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allege that the legislature by the act, chapter 490 of the Laws of 1887, provided for the appointment of inspectors of election by the defendants to represent this large body of voters at the ballot boxes. It is seen from this statement that the relators have no private interest in this question, but the interest and the right rest with that body which they claim to represent, and which from their papers amounted to nearly 70,000 voters at the last municipal election. If these relators are in reality the proper representatives of such a constituency, the defendants under the act should appoint an inspector for each district as applied for. But the question is whether these relators are such representatives. On the papers produced and read by them on the application for the writ, they made out a case for such appointment, and if their papers were uncontradicted the application for the writ should be granted.

But are their papers uncontradicted?

To answer this question in such a case, where public interests and the right of this large body of voters to be represented at the ballot boxes under the act of 1887 are concerned, the court ought to and will look carefully into the record for the purpose of seeing where the right of the case is, and in the exercise of a legal and proper discretion in regard to issuing the peremptory writ, will refuse it if satisfied from the record that there is an honest dispute on some substantial basis, regarding material facts, which ought to be properly settled before the writ issues, even though in the strictest and most technical construction of the papers or pleadings, it should appear that these issues are inartificially or loosely made up. The legislature intended that where so large a part of the voting population as fifty thousand should vote outside of the two great parties, that such part should have an inspector of election at each ballot box to see that the election was fairly conducted, and that their interests were not improperly overlooked.

When individuals claiming to be representatives of this body of voters appear before the courts, and such claim is uncontested, or the contest is based upon no substantial

grounds, there is no doubt as to the duty of the court under such circumstances. But in the case at bar an inspection of the record shows that there are three different bodies, each claiming to be the sole and proper representative of the voters who deposited sixty-eight thousand votes for their candidate for mayor of New York in the fall of 1886, and each body claims to be entitled to the appointment of the additional inspector. The learned counsel for the appellants here claims that there is no substantial contradiction in this record as to any material fact, and that the Special Term should have therefore granted the application of his clients.

We do not agree with this view of the contents of the record. It is made up exceedingly loosely, and it is somewhat difficult to tell exactly what was before the learned judge at Special Term. We think enough appears, however, to authorize us in holding that he was right in denying the writ on account of the existence of disputed questions of fact. The record contains the brief opinion of the learned justice, in which he says: "There is an insuperable objection to granting a peremptory writ of *mandamus* to *either* of the petitioners in this matter." And again: "There is, however, involved in this application a question of fact as to which if either of the *three* applicants is the party or organization which cast over fifty thousand votes at the last municipal election."

This language certainly imports that others than the relators had applied for the writ, for it speaks of three applicants therefor. I also find in the record, entitled "In the matter of the appointment of the additional election inspectors," a statement of an "order to show cause obtained on motion of counsel for Progressive Labor Party." Also a statement entitled in the same way with the following: "Order denying motion without prejudice and vacating injunction. The foregoing order, a copy of which is hereto annexed marked Exhibit No. 2, was read and placed on file." The present proceedings are entitled in the name of the people with Mr. McMackin and another as relators. This, therefore, shows in this very record that there

were other proceedings of a like nature before the Special Term. I find no copy of that order to show cause or of its denial, printed in the record, but being referred to therein, and being now presented to the court, we think it proper to look at the papers to see just what was done. It was an application in behalf of the Progressive Labor Party and the order to show cause why the writ should not issue is entitled as stated above, and recites that it is granted upon the annexed affidavit of William Penn Rogers and the exhibits and papers therein referred to. The affidavit is annexed and shows, if true, quite a clear case for the appointment of inspectors for the party therein spoken of, viz.: The Progressive Labor Party. The order is dated the twenty-first of September and enjoins the proceedings of the defendants until the hearing and decision of the motion. Mr. Justice PATTERSON at Special Term in his opinion, already referred to, recites the fact that the defendants have been enjoined since the twenty-first of September. There was no injunction in the order procured by the relators. All this is alluded to for the purpose of the argument, that it fairly appears from this very record now before us that there were several applications for a *mandamus* against these defendants which were heard together and somewhat informally before the learned justice at Special Term, and that from the recital in the order to show cause which is above referred to although not printed, it appears there was an affidavit of Mr. Rogers upon which the order to show cause was granted, which must have been sworn to therefore as early as the twenty-first of September, and an inspection of it shows it was so sworn to. It is not necessary, therefore, to rely wholly on the affidavit of Mr. Rogers appearing in the record as sworn to October sixth as raising an issue of fact, for this affidavit of September twenty-first does it in clear and emphatic terms, and as the applications were all heard together the papers used may all be referred to for the purpose of showing the issues therein. From all this we think it is sufficiently apparent that there were questions of fact existing in these various applications for a *mandamus* which required Mr.

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Justice PATTERSON to deny a peremptory writ and justified him in issuing an alternative one.

The order denying such application must therefore be affirmed.

The alternative writ having been issued and served, it is claimed by appellants' counsel that there is no issue raised by the return of the board, and that the two individuals who are members of the board should not have been allowed to make a return and if their return is to be permitted that even then there is no issue raised by it and no answer made to relator's application. It may be perhaps admitted that in strictness there is no proper denial in the return of the board, but in that of the two individual members thereof we think it is conclusively shown that there is a serious question of fact having a substantial basis to be decided before the relators shall be entitled to the writ asked for.

While not deciding what would be the rule in cases of strictly private rights, we think that in cases such as this, where the question is who are the real representatives of this constituency, the court will not be driven into issuing a peremptory writ to guide the conduct of public officers charged with this public duty, upon any narrow construction of a return to its alternative writ, where from all the papers it is seen that there is a substantial issue of fact and of a material nature, which should be decided in the way pointed out by the law before the issuing of such writ. In such cases it is a wise and proper exercise of discretion to refuse the application.

When a board of public officers stands at a tie, so that no return putting at issue the material facts alleged in the alternative writ can be agreed upon by a majority of the board, we are not inclined to reverse the action of the lower court in permitting individual members of the board to put in a denial under oath of some or all of the material allegations contained in the writ, and in directing a trial of such issues in the legal way.

We think the action of the Supreme Court was right and its orders should therefore be affirmed.

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The opinion of the learned General Term contained a provision for the entry of an order to try at once the questions arising in the proceeding. We assume that the parties will still be willing to waive a trial by jury, and to immediately test the question as to which body is entitled to the inspectors, and we therefore affirm the proceedings with leave to apply to the Supreme Court for the trial of the issues forthwith before one of the justices thereof, or in such other way as the parties may agree upon and the court shall approve.

All concur.

Ordered accordingly.

**AUGUSTUS M. HODGE, Execntor, etc., et al., Appellants, v.
RICHARD SLOAN, Respondent.**

A covenant in restraint of trade is valid if it imposes no restriction upon one party, which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into, and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee.

Where a grantee binds himself by a covenant in his deed, limiting the use of the land purchase in a particular manner so as not to interfere with the trade or business of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor, taking title with notice of the restriction; and this, although the assignees of the covenantor are not mentioned or referred to. It is not necessary that the covenant should be one technically running with the land; it is sufficient that the purchaser has notice of it.

N. was the owner of certain lands containing deposits of building sand and the sale of the sand constituted his only business. S. offered to purchase a small parcel of the land, but N. declined to sell on the ground that it would interfere with his business. S. agreed to purchase, covenanting not to sell any sand off from the parcel. N. thereupon sold and conveyed, his deed containing such a covenant on the part of the grantee. S. subsequently conveyed by warranty deed, to defendant, without covenants on the part of the latter, who, however, had notice before taking his deed of the covenant in the deed to his grantor. Defendant opened a pit on his land, sold sand therefrom and declared that he should

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continue to sell notwithstanding such covenant. *Held* (ANDREWS and EARL, JJ., dissenting), that an action was maintainable to restrain such sale. *Brewer v. Marshall* (4 C. E. Green, N. J. Eq. 537) distinguished.

(Argued July 1, 1887; decided October 28, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made May 6, 1884, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

This action was brought to restrain the defendant from selling sand taken from land conveyed by the plaintiff to John D. Sloan, and by him to the defendant, in violation of a covenant contained in the deed to John D. Sloan, and of which the defendant, when he bought, had notice. The complaint was dismissed. After an appeal to this court from the judgment of General Term, the plaintiff died and his executor was substituted as appellant.

There is no controversy in regard to the findings of the trial judge as to the facts, and from those it appears that on the 9th day of May, 1868, Edward Null, the original plaintiff, and afterwards the appellants' testator, was the owner in fee of about forty acres of land in the village of Canajoharie, containing deposits of building sand. These he opened and the sale therefrom at that time and ever since constituted his only business. His customers came from Canajoharie, Palatine Bridge, Amsterdam and the city of Utica. Sales averaged about ten loads each day. This business being well established, one John D. Sloan applied to him for a small parcel of the land being about one-half acre, as described in the complaint, but plaintiff declined to sell on the ground that by such sale he would be injuring his business and depriving himself of his living, and upon such objection being made, Sloan agreed to purchase the land and pay therefor \$650, and stipulate not to sell any sand off said land, and pursuant to such negotiation the plaintiff executed a written contract of sale of said parcel of land to him for such consideration, and containing a covenant to that effect, and Sloan afterwards

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having fully paid the consideration, plaintiff, by warranty deed, conveyed the contracted land to him. In that deed, immediately after the description was inserted the covenant contained in such contract, viz.: "Said party of the second part hereby agreeing not to sell any sand off of said premises." The deed was duly recorded in the Montgomery county clerk's office on March 30, 1875. Sloan accepted the contract and deed, and possessed and occupied the land thereunder. On the 26th day of March, 1881, by warranty deed, John D. Sloan conveyed the last mentioned premises to his son, Richard Sloan, the defendant. That deed contained no exception, reservation or condition, and no reference to the covenant contained in the deed to John D. Sloan, but the defendant, before and at the time of taking the conveyance, had full knowledge of such covenant and that it was contained in the deed to his grantor. With this notice he entered upon the described premises, opened a bank or pit and sold sand therefrom, and notwithstanding the remonstrances of the plaintiff and his request to observe and keep the covenant of John D. Sloan, the defendant declared that he should continue to sell the sand notwithstanding such covenant.

The trial judge also found that the plaintiff "at the time of the sale of said land to John D. Sloan had and ever since then has had, and now has upon his said land retained by him sufficient sand to supply the demand for sand for local use, and to be transported to a distance and used, and that such supply will be sufficient for all time to come, and plaintiff during all such time has had facilities to supply the demand for such sand, and has fully supplied the same, and desires to continue the sale of sand and to fully supply such demand for the same in future."

And further, that the covenant was inserted in the deed from the plaintiff to John D. Sloan to prevent competition in the plaintiff's business of selling sand. But as conclusions of law he held, "1st. That the clause inserted in the deed from the plaintiff to John D. Sloan was not an exception, reservation or condition, but was a covenant, the deed having been accepted and the land therein described

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held by virtue thereof by the said John D. Sloan, such covenant was his covenant not to sell sand off the premises granted, and the same having been incorporated in the instrument by which title to the land was acquired, if not void as against public policy, ran with the land and bound the grantees and assigns of said Sloan; 2d. Said covenant was in restraint of trade, contrary to public policy and void, and hence dismissed the complaint."

D. S. Morrel for appellants. A party to an invalid contract will not be permitted to avail himself of its invalidity, unless he restores the consideration to the other party. (*Warren v. Jones*, 51 Me. 146; *Benj. on Sales* [Burnett's 4th Am. ed.], § 521, note; *Hunt v. Turner*, 9 Texas, 385.) The defendant is in no better condition than his father, for he took the title of the lot from his father with full knowledge of the covenant in question. (*Trustees v. Lynch*, 70 N. Y. 441, 449.) The restraint contracted for is not of such character as to be condemned as violating the rules of law. (*Dia. M. Co. v. Roeber*, 35 Hun, 421; *Hubbard v. Miller*, 27 Mich. 15, 19; *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351; *Morse, etc., Co. v. Morse*, 103 Mass. 73; *Leather C. Co. v. Lossont*, L. R. 9 Eq. 345; *Trustees v. Lynch*, 70 N. Y. 446.) The covenant must be construed with reference to the testator's business, which it was designed to protect and the surrounding circumstances, and not as imposing the general restraint its language imports. (14 West. Rep. 630; *Morse T. D. & M. Co. v. Morse*, 103 Mass. 76; *Ingram v. Stiff*, 5 Jur. [N. S.] 947; *D. M. Co. v. Roeber*, 35 Hun, 421; *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351.) The covenant in this suit relates to, and is attached to the land conveyed, and runs with it. (*Norman v. Wells*, 17 Wend. 136; *Ver Plank v. Wright*, id. 506; *Van Rensselaer v. A. & W. S. Co.*, 1 T. & C. 625; *Broner v. Jones*, 23 Barb. 160; 1 Washb. on R. Prop. 495, 504; 2 id. 286, 288.) This covenant is not inherently vicious. (*Hubbard v. Miller*, 27 Mich. 15, 19; 3 N. Y. S. C. [T. & C.] 622; *Trustees v. Lynch*, 70 N. Y. 446; *Post v. Weil*, 8 Hun, 418.)

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H. L. Huston for respondent. The clause in question is repugnant to the grant. It prohibits the most natural use of the very thing granted. (*Hathaway v. Payne*, 34 N. Y. 116; *Hill v. Priestly*, 52 id. 635; *Craig v. Wells*, 11 id. 322.) If the clause be regarded as a covenant, still it does not run, or purport to run with the land, nor bind, nor purport to bind, the assigns of the covenantor. (*Brewer v. Marshall*, 4 C. E. Green, 545; *Norcross v. James*, 2 East. Rep. 709 [Mass.].) Covenants running with the land, as between vendor and purchaser, are not favored in law. (1 B. & H. Com. 731; *Keppell v. Bailey*, 2 M. & K. 517; *Norman v. Wells*, 17 Wend. 153, 154.) Equity will not in such a case charge the conscience of a party with the observance of the covenant of his grantor. (*Brewer v. Marshall*, 4 C. E. Green, 545; *Case v. Haight*, 3 Wend. 635.) The alleged covenant is essentially vicious, as contravening public policy and being in unlawful restraint of trade. (*Chappel v. Brockway*, 21 Wend. 158; *Dunlap v. Gregory*, 10 N. Y. 244; *Weller v. Hersee*, 10 Hun, 433; *Sar. Co. Bk. v. King*, 44 N. Y. 87; *Curtis v. Gokey*, 68 id. 300; *Ross v. Sadgbeer*, 21 Wend. 166; *Fisher v. Bush*, 35 Hun, 645; *Maier v. Hornan*, 4 Daly, 168; *Lawrence v. Kidder*, 10 Barb. 641; *Arnot v. P. & E. Coal Co.*, 68 N. Y. 558; *Nobles v. Bates*, 7 Cow. 306; *Van Marter v. Babcock*, 23 Barb. 633; *Smith v. Smith*, 4 Wend. 407; *Noah v. Webb*, 1 Edw. 604; *Sanders v. Hoffman*, 64 N. Y. 248; *Mott v. Mott*, 11 Barb. 127; *Brewer v. Marshall*, 4 C. E. Green, 538.)

DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice, for it takes from one party an advantage which he refused to sell, and secures to the other without price a privilege which his grantor was unable to buy. Nor do we find that this denial of private right is required by any rule of public policy. Assuming with the respondent that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by

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a consideration which made it reasonable for the parties to enter into it, or in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. . This is the doctrine of *Chappel v. Brockway* (21 Wend. 157), and *Ross v. Sadgbeer* (id. 166), derived by a learned court from the leading case of *Mitchel v. Reynolds* (1 P. Wms. 181), and an examination of subsequent decisions. It is also so amplified and discussed in a case just decided by this court (*Diamond Match Co. v. Roerber*), opinion by ANDREWS, J. (106 N. Y. 473), as to make any elaboration of the general rule quite superfluous.

The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy and which the plaintiff was willing to sell provided it should not be made an instrument for the destruction of his means of livelihood or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the State of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools, or instruments, or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him upon a sale of the instrument to consent to that use, or prohibits him from binding his vendee against it.

We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way, and in order to do this it was necessary that he should preclude himself from so using it as that by its means he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not

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larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right with which the question of public policy has little if anything to do.

Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity at least bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice, as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it. The question in equity being, as is said in *Tulk v. Moxhay* (11 Beav. 571; 2 Phillips, 774), not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in *Tallmadge v. East River Bank* (26 N. Y. 105), where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted.

In *Trustees v. Lynch* (70 N. Y. 440), the action was brought to restrain the carrying on of business on certain premises in

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the city of New York, of which the defendant was owner, upon the ground ~~that~~ the premises were subject to a covenant reserving the property ~~exclusively~~ for dwelling-houses. The court below held, among other things, that ~~the~~ covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed, the covenant held to be binding upon a subsequent grantee with notice as well upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon "shall be used for the sale of ale, beer, ^{drugs, wine &c} spirits," etc., "or as an inn, public house or beer house." ^{or cell} (*Carter v. Williams*, L. R., 9 Eq. Cas. 678.) And it is said a man may covenant not to erect a mill on his own lands. (*Mitchel v. Reynolds*, *supra*.)

Many other instances of restraint might be referred to, and where it is of such nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business or certain kinds of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice. (*Parker v. Nightingale*, 6 Allen, 341, 344; *Burbank v. Pillsbury*, 48 N. H. 475.) Nor is it essential that the assignees of the covenantor should be named or referred to. (*Morland v. Cook*, L. R., 6 Eq. Cases, 252.) In *Tulk v. Moahay* (1 Hall & Quell's Ch. Rep. 105), it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of land which was conveyed to him in fee simple, covenanted with the vendor that the land should be used and kept in ornamental repair as

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a pleasure garden, and it was held that the vendor was entitled to an injunction against the assignee of the purchaser to restrain them from building upon the land. Upon the appeal the chancellor (COTTENHAM) said: "I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course, upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of his jurisdiction, to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed." The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner, will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. * * * "Of course," he says, "of course the party purchasing the property which is under such restriction, gives less for it than he would have given if he had bought it unincumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party who takes property at a less price because it is subject to a restriction, should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding." And in language very applicable to the case before us he adds: "Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from

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Mr. *Tulk*." This case is cited and followed as to restrictive covenants in many cases. (*Brown v. Great East. R. Co.*, L. R. 2 Q. B. Div. 406; *London, etc., Ry. Co. v. Comm.*, L. R. 20 Ch. Div. 562, 576.) Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement, or refused, according to its discretion (*Trustees, etc., v. Thacher*, 87 N. Y. 311); but where the agreement is a just and honest one, its judgment should not be in favor of the wrong-doer. Such seems to us the character of the covenant in question; it is restrictive, not collateral to the land, but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded.

Brewer v. Marshall, (4 C. E. Green [N. J. Eq.], 537), is cited by the respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case. But in the opinion of the court it was not one for the interference of a court of equity. Among many other cases *Tulk v. Moxhay* (*supra*) is cited, and the learned court say: "It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point," and from a "review of the authorities" the court say "it is entirely satisfied that a court of equity will sometimes impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was whether the covenant then in controversy was embraced within the proper limits of this branch of equitable jurisdiction. By a divided court an injunction was denied. The circumstances were quite unlike those before us and the decision furnishes no precedent for us to follow.

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The judgment appealed from should be reversed and new trial granted, with costs to abide the event.

All concur except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting because, in their opinion, the covenant was a personal one and did not bind the grantee of the land. Judgment reversed.

ROBERT J. GRAY, Respondent, v. FRANCIS T. WALTON,
Appellant.

Unless otherwise expressed in the contract, the vendor, on a sale of chattels, is bound to deliver them to the purchaser where they are at the time of sale, on performance by the latter of the terms of sale.

At an auction sale by defendant of the furniture, etc., of a hotel, made on the premises, plaintiff purchased various articles on separate bids. It was announced by the auctioneer at the opening of the sale that the goods must be removed before the first of May, as the lease expired on that day. A bill of items was delivered to plaintiff, in which there was an overcharge as to one of the articles. This mistake was called to the attention of the auctioneer and plaintiff offered to pay the true amount, but the mistake was not corrected until May second, when plaintiff paid the bill to the auctioneer who paid the money over to defendant, but on calling at the hotel plaintiff was unable to obtain the goods. In an action to recover their value *held*, that the terms of sale did not relieve defendant from the obligation to deliver, except on the contingency that the purchaser failed to complete the purchase before May first; that plaintiff was excused from making payment before that time, the delay having been occasioned by the neglect and default of the defendant in making the correction in the bill; that as the sale, although comprising distinct articles, purchased on separate bids, was treated by the parties as one transaction, plaintiff could not be held to have been in default as to any portion; that, therefore, plaintiff was entitled to recover; and that his measure of damages was the value of the goods on May second.

Also, *held*, it was no answer to plaintiff's claim that he might have tendered the true amount and thus have entitled himself to a delivery before May first; that he was not bound to do this, and having offered to comply with the terms of sale, was not in default.

(Argued October 12, 1887; decided October 28, 1887.)

Statement of case.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 8, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below, 20 J. & S. 534.)

This action was brought to recover the value of certain goods purchased by plaintiff at auction sale of the furniture and fixtures of the St. James Hotel, in the city of New York, which belonged to defendant. The sale took place on the 24th and 25th days of April, 1883. It was conducted by an auctioneer under the direction of the defendant. The terms of sale were as follows: "A satisfactory deposit required from all purchasers. All goods must be fully paid for before being removed; and if not paid for within twenty-four hours after the sale, the deposit will be forfeited, the sale annulled and goods resold for account of the purchaser. All goods are sold as they are and no allowance will be made for damaged articles. All goods must be removed at purchaser's own cost and risk. Sale will also be made subject to terms as stated at time of sale."

It was also proved by the auctioneer and by his clerk, that it was distinctly announced at the opening of the sale, and several times during the sale, that the goods would have to be removed before the first of May, on account of the property then going into the possession of parties other than the defendant. The fact of such announcement having been so made was uncontradicted, and was held by the court to be an undisputed fact in the case.

A bill of the articles purchased was made out and delivered to the plaintiff on the evening of April twenty-sixth. This bill the plaintiff claimed was erroneous in that he was therein charged with the sum of \$50 for each of two washing machines, when in fact as he contended, he had purchased both for the sum of \$50. The plaintiff sought to have this error corrected, but the auctioneer was so busy, as he said, with the sale that he was unable to see the plaintiff in regard to it until the second day of May, when an agreement in regard to this difference was effected. Then the plaintiff paid his bill,

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and the auctioneer stated that the doors would be open in the afternoon and that then he, the plaintiff, could get his goods. Plaintiff went on said afternoon for his goods, but could not get them, and thereupon immediately notified the auctioneer who promised that he would see to it that plaintiff should obtain the goods. The defendant received the money paid to the auctioneer. The plaintiff made several other attempts to get his goods, which proved unavailing.

As the plaintiff and the auctioneer disagreed upon the trial as to the terms of the settlement of May second, the court submitted to the jury the question as to what the original agreement was, and in doing so instructed them that if the plaintiff agreed to pay \$50 for each of the two machines, then it became his duty to remove his goods before the first day of May, and in such case he was not excused, by reason of the dispute which he had created, for not removing them before that time; but that on the other hand, if plaintiff's version of the transaction was the correct one and he had bid \$50 for both machines, and it was so stated at the time to the auctioneer, the failure of the auctioneer to deliver a correct bill and the subsequent negotiations based thereon would excuse the plaintiff's neglect in not taking the goods before the first of May.

Jos. A. Shoudy for appellant. It was error for the court to make the defendant's liability depend upon the merits of the controversy in regard to the washing machines. Those machines were put up and sold as a separate sale, distinct from any other article and such sale constituted a separate contract. (Benj. on Sales, § 135.) The defendant should have been allowed to show, as he offered to do, that his lease of the premises where the sale was made expired on or before the first of May, and that the goods in question after the first of May passed out of his possession and out of his control. (*Cockcroft v. N. Y. & H. R. R. Co.*, 69 N. Y. 201.)

Jacob F. Miller for respondent. There was no valid contract between the parties until the second of May, 1883. (*Bissell v. Balcom*, 33 N. Y. 283.) On that day when the

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title of the goods passed to the plaintiff, there was an implied warranty of title and of delivery of the goods, as well as an express agreement of delivery. An irrevocable license to plaintiff to enter upon the premises and remove the goods was implied. (*Griffin v. Baird*, 62 N. Y. 331; *In re Sarah Ann*, 2 Sumn. 211; *McCleod v. Jones*, 105 Mass. 403; Benj. on Sales [3 Am. ed.], § 886; Story on Sales, § 449; *Willis v. Willis*, 6 Dan. [Ky.] 49; *Drake v. Wells*, 11 Allen, 142; *Nettleton v. Sikes*, 8 Met. 43; *Giles v. Simonds*, 15 Gray, 441; 2 Kent's Com. 478; *West v. Wentworth*, 3 Cow. 82; *Clark v. Pinney*, 7 id. 681; *Griffin v. Colvin*, 16 N. Y. 489; *McNeal v. Emerson*, 15 id. 384; *Wood v. Mauley*, 11 Ad. & El. 37; *Foot v. March*, 51 N. Y. 202; *Kimberly v. Patchin*, 19 id. 350; *Dey v. Dix*, 9 Wend. 129; *Taylor v. Reed*, 4 Paige, 561; *Gray v. Luce*, 17 J. & S., 540.) The plaintiff had a reasonable time after payment to remove the goods. (*Danforth v. Walker*, 40 Vt. 257; *Blydenburgh v. Welch*, 1 Bald. 331.) The promise of Mr. Harnett that the plaintiff should have his goods in the afternoon of May second was, in law, the promise of the defendant, for it was within the scope of his authority. (*Amerman v. M. C. R. R. Co.*, 65 N. Y. 116; *Walsh v. Hartford F. I. Co.*, 73 id. 5; *Hazard v. Spears*, 2 Abb. 353; *Elwell v. Chamberlain*, 31 N. Y. 619; *Murray v. Binninger*, 3 Keyes, 107; *Leslie v. Willie*, 47 N. Y. 652.) An amount sufficient to indemnify the party injured for the loss, which is the natural result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable. (*Baker v. Drake*, 53 N. Y. 211; *Thayer v. Manley*, 73 id. 307; *Price v. Keyes*, 1 Hun, 191; *Gray v. Luce*, 17 J. & S. 540.) While the price which goods bring at a public sale is some evidence of their value, it is not the best evidence of value or even strong evidence of value. (*Campbell v. Woodworth*, 20 N. Y. 499; *Whitehouse v. Atkinson*, 3 Car. & P. 344; *Beach v. R. & D. B. R. R. Co.*, 37 N. Y. 457, 470;

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Wells v. Kelsey, id. 143; *Gill v. McNamee*, 42 id. 44, 46; *Knick. L. Ins. Co. v. Nelson*, 78 id. 137, 145.) There was one sale, one bill, one transaction, notwithstanding the number of articles included in the bill. (*Jenness v. Wendell*, 51 N. H. 67; *Allard v. Greasert*, 61 N. Y. 1; *Mills v. Hunt*, 17 Wend. 333; 20 id. 431.)

ANDREWS, J. By the general rule of law, the vendor on a sale of chattels is bound to deliver them to the vendee at the place where they are at the time of the sale, on performance by the latter of the terms of sale, although the contract is silent on the subject of delivery. The obligation to deliver, if not expressed, is implied. (2 Kent's Com. 677; Benj. on Sales, 555.) The obligation, however, may be limited, or qualified, or altogether excluded by the terms of the contract. The terms of the auction sale in this case did not relieve the defendant from the obligation to deliver the property purchased by the plaintiff, except in the contingency that the purchaser failed to complete the purchase by paying for and removing the property from the St. James Hotel before the first of May. Up to that time the defendant, on payment being made, was bound to deliver the goods, on the premises, when called for by the plaintiff. The omission of the plaintiff to pay for the goods, or to call for or remove them before the first of May, released the defendant from any further responsibility, and the goods remained on the premises after that time at the risk of the plaintiff, unless the delay was attributable to the act of the defendant, or unless the defendant waived the condition as to payment and removal. Upon the facts found we think the plaintiff was excused, and that the delay in paying for the goods until the second of May was occasioned by the neglect and default of the defendant to correct the bill of items in time to enable the plaintiff to comply with the terms of sale. The jury have found that the two washing machines, which were charged in the bill at \$100, were struck off for fifty dollars. The plaintiff repeatedly called upon the auctioneer before the first of May, to correct

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the bill, and expressed his readiness to pay the true amount, but was put off from day to day until the second of May, when the controversy was settled and the plaintiff paid the bill to the auctioneer, who paid over the money to the defendant. The delay having been caused by the act of the defendant in demanding a greater sum than he was entitled to receive, he cannot in justice be permitted to insist that the omission of the plaintiff to pay for and receive the goods before the first of May, discharged him from the obligation to make delivery. The limitation in the contract was inserted for his protection as he was to vacate the premises on the first of May, but it was connected with the correlative right of the purchaser to entitle himself by payment to call upon the defendant for the goods and to receive them before the expiration of the period mentioned. It is not, we think, an answer to the claim of the plaintiff that he might have tendered the true amount and thus have entitled himself to a delivery before the first of May. He was not bound to take this course. Having offered to comply with the terms of sale, he was not in default, and the defendant having on the second of May accepted payment, he was, we think, under obligation to deliver the goods on the premises, or, at least, to put them within the power, or under the dominion of the plaintiff, notwithstanding the expiration of the period for removal fixed by the contract. (See *Story on Sales*, § 310, and cases cited.) The sale, although comprising distinct articles purchased on separate bids, was treated by the parties as one transaction, and the separate sales as parts of an entire contract. (*Mills v. Hunt*, 17 Wend. 333; *S. C.*, 20 id. 431.) The charge as to the rule of damages was correct. The plaintiff was entitled to recover the value of the goods on the second of May, if entitled to recover at all, and the charge that the jury in determining the value, might consider the price the goods brought on the sale, and the refusal to charge that the recovery was limited to the purchase-price or that the purchase-price was *strong* evidence of the value, was proper. (*Campbell v. Woodworth*, 20 N. Y. 499; *Gill v. McNamee*, 42 id. 44, 46; *Hoffman v. Conner*, 76 id. 121, 124.) In

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view of our disposition of the main questions, the exceptions on other points do not call for special consideration.

The judgment should be affirmed.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

JOHN J. SERVISS, Appellant and Respondent, v. LUCY McDONNELL, Impleaded, etc., Appellant and Respondent.

An incoming partner can only be made liable by agreement for the prior debts of the firm, whether he succeeds an outgoing partner by purchase, or whether, upon the death of one partner he joins with the survivors in carrying on the business.

An undertaking on his part, alone or in connection with others, that the new firm will pay the debts of the old firm, can be enforced only by the old firm; its creditors may not sue for a breach of it.

Plaintiff was the owner of certain promissory notes, executed by the individual members of a firm, for a firm debt. One of the makers having died, a new firm was formed to continue the business, composed of the surviving members of the old firm and the widow and a son of the decedent. By the new articles of copartnership it was declared that the widow and son were to have a third interest and were to pay "one-third of the liabilities of the late firm." In an action to recover the amount of the notes, in which the widow alone defended, *held*, that if the action was maintainable at all against her, it was only for one-third of the amount.

It seems that as plaintiff's contract was with the members of the old firm, in the absence of evidence that there had been a change of credit or a promise on plaintiff's part to accept the incoming members as his debtors, or some analogous act, no recovery could be had against them; that the obligation of the contract did not enure to plaintiff's benefit.

But *held*, that as the question of the widow's liability for the one-third merely was not raised on trial, it could not be raised upon appeal.

(Argued October 3, 1887; decided November 29, 1887.)

THESE were cross appeals from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the first Tuesday of May, 1885, which modified, and affirmed as modified, a judgment in favor of plaintiff entered upon a verdict.

107	260
127	642
107	260
135	602
107	260
147	582
107	260
157	441
107	260
163	280
107	260
169	427

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The nature of the action and the material facts are stated in the opinion.

Nathaniel C. Moak for plaintiff. Defendant not having claimed there was any question of fact which should be sent to a jury cannot now insist there was one. (*Ormes v. Dauchy*, 82 N. Y. 443, 448, 449; *Provost v. McEncroe*, 102 id. 650; 4 East. R. 778; *Dillon v. Cockcroft*, 90 N. Y. 649, 650.) Fraud may be proved by circumstances. (*Clark v. Baird*, 9 N. Y. 183; *Waterbury v. Sturtevant*, 18 Wend. 353, 362; *Stewart v. Strasburger*, 51 How. Pr. 388.) When the contract, on its face, is susceptible of more than one construction, the acts of the parties under it are the best expositors of what their intention really was. (*Cambridge v. Lexington*, 17 Pick. 230; *Livingston v. Ten Broeck*, 16 Johns. 23; *Onthank v. Lake Shore*, 8 Hun, 131; 71 N. Y. 194; *Rockwell v. Humphrey*, 57 Wis. 414.) The court should, as far as possible, place itself in the "shoes" of the parties, and from their situation and evident purpose and intention, determine what they really intended; this intention should be carried into effect so far as the rules of language and of law will permit. (2 Pars. on Cont. [7th ed.] 631, 499; *Hurley v. Brown*, 98 Mass. 545, 546, 548.) An agreement may be implied from the acts of and transactions between the parties. Such a contract does not differ from an express one, except in form of proof. (Bish. on Cont. [2d ed.], §§ 257, 258, 259, 263.) Mrs. McDonnell is presumed to have known the contents of the books of the firm of which she was a member, she was equally bound by acquiescence, it being her duty to inform herself as to what her own firm was doing and spreading upon the legitimate record of its doings. (*Cheever v. Lamar*, 19 Hun, 132, 135; *Allen v. Colt*, 6 Hill, 318; *O'Brien v. Hanley*, 86 Ill. 278.) While an incoming partner is not liable for the prior debts of the firm without a special promise, yet very slight testimony will be sufficient to prove an assumption by him of those debts. (*Cross v. Burlington*, 17 Kans. 336; *Updyke v. Doyle*, 7 R. I. 447, 463; 2 Collyer's Law on Part. by Wood [6th ed.], 831 § 525; *Shaw v.*

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McGregory, 105 Mass. 96, 102; *Frazer v. Howe*, 106 Ill. 564, 581; *Keller v. West, etc.*, 39 Hun, 348, 353, 355; *Mores v. Society, etc.*, 19 N. Y. Weekly Dig. 247; *Radd v. McMorran*, 17 id. 258; 30 Hun, 309.) The transfer to defendant by the survivors of an interest in the firm was a sufficient consideration for her assumption as a member of the new firm of the debts, or of a portion thereof of the old firm, so as to entitle a creditor thereof to recover of her. (*Arnold v. Nichols*, 64 N. Y. 117, 119; *Prince v. Kohler*, 77 id. 91; *Allendorph v. Wheeler*, 23 Weekly Dig. 319; 2 Cent. R. 393, 394; 5 N. East R. 102 N. Y. 649; *Pulver v. Skinner*, 42 Hun, 322, 325, 326; *Vrooman v. Turner*, 69 N. Y. 280.) Through the death of John McDonnell the old firm of McDonnell, Kline & Co. was dissolved. The assets were joint property and the title thereto vested in the survivors, charged with a trust for the payment of the firm's debts. (*Menagh v. Whitwell*, 52 N. Y. 158; *Moss v. Gleason*, 64 id. 207; *Shackelford v. Shackelford*, 32 Gratt. [Va.] 481; *Arnold v. Nichols*, 64 N. Y. 117; *Brown v. Curren*, 14 Hun, 260.)

N. P. Hinman for defendant. The agreement imposed no liability upon Lucy McDonnell to this plaintiff as a creditor of the old firm, dissolved by the death of John McDonnell. (*Edick v. Green*, 38 Hun, 202; *Wheat v. Rice*, 97 N. Y. 296.) This action is strictly legal and not an equitable one. (*Bradley v. Aldrich*, 40 N. Y. 504; *Arnold v. Angell*, 62 id. 508; *People's B'k v. Mitchell*, 73 id. 415; *Stevens v. Mayor, etc.*, 84 id. 296.) The plaintiff having failed to prove the cause of action he alleged, and this defendant having taken proper objections thereto by motions and objections to evidence, exceptions and requests at the close of the trial, no amendment being either asked for or ordered, the judgment upon another cause of action not alleged, cannot be sustained upon appeal, notwithstanding defendant was not misled. (*Southwick v. First Nat. B'k*, 84 N. Y. 420; 20 Hun, 349.) Independent of the written agreement of partnership the defend-

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ant, appellant, was not liable for the debts of the former partnership. (*Sage v. Woodin*, 66 N. Y. 530, 578.)

DANFORTH, J. The plaintiff was the owner of two notes, each made by John McDonnell, Perry Kline and Thomas Harvey, who thereby jointly and severally promised to pay to his order, in one case \$500, and in the other \$2,000, in one year from April 1, 1873, with interest. The makers constituted the firm of McDonnell, Kline & Co., and the notes were given in consideration of money loaned to them in that capacity. One of the makers, John McDonnell, died, and the complaint alleges that thereafter and in February, 1878, his widow, Lucy McDonnell, Perry Kline and Thomas Harvey formed a new firm under the same name of McDonnell, Kline & Co., and in consideration of a transfer to them of the business and property of the old firm, agreed to pay into said new firm and for the purpose of carrying on said business, certain large sums of money, and to assume and pay all the obligations, debts and liabilities of said former firm of McDonnell, Kline & Co., among which debts, liabilities and obligations were the two promissory notes above referred to; that no part of either of said promissory notes has been paid, except that the interest has been paid to April 1, 1883, and for the principal sum, with interest, the plaintiff asked judgment against Lucy McDonnell and Thomas Harvey.

The action was commenced February 7, 1884, and the defendant, Lucy McDonnell, alone answered, in substance denying all the material allegations of the complaint and setting up that the alleged cause of action did not accrue within six years. Upon the trial at the circuit before a justice of the Supreme Court and a jury, the only proposition seriously litigated was the liability of Mrs. McDonnell, and to establish that parol evidence alone was given. Its force need not be considered, for at a subsequent stage of the trial she put in evidence written instruments containing the only agreement by which she can be bound, and the question upon the whole case was finally submitted to the trial judge as one of law. He not only denied

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the defendant's motion for a nonsuit, but also refused to rule, when subsequently requested by her counsel, "that the plaintiff was only entitled to recover against her one-third of the amount due upon the notes," and upon the plaintiff's application directed a verdict in his favor upon the whole sum claimed, and judgment was entered. Upon the defendant's appeal to the General Term, that court modified the judgment by reducing it to one-third, and, from the judgment so modified, both parties appeal to this court, the plaintiff against the modification, and the defendant because it was not altogether set at naught.

The plaintiff's appeal is so fully met by the reasoning of the learned judge at General Term that little need be said. An incoming partner is not as of course, liable for the debts of the firm, whether he succeeds an outgoing partner by purchase, or whether upon the death of one partner he joins with the survivors in carrying on the business by virtue of a new partnership. He may become liable by agreement, but an undertaking on his part alone, or in connection with others, that the new firm will pay the debts of the old firm, can be enforced only by the old firm, and the creditors could not sue for the breach of it. The evidence which led the General Term to modify the judgment was a written instrument dated February 25, 1878, executed by Lucy McDonnell, her son Willard McDonnell, Perry Kline and Thomas Harvey. By its terms these persons became partners under the name of McDonnell, Kline & Co., to continue the business theretofore conducted by the former firm of that name, for such time as they should agree, with a capital equal to the amount of the capital of the old firm, and it was declared that Mrs. McDonnell and Willard McDonnell, as parties of the first part thereto, were to pay one-third of the liabilities of the late firm of McDonnell, Kline & Co., and were jointly to receive one-third of the profits of said business, to pay one-third of the expenses of conducting it and bear and pay one-third of all losses which might happen, and furnish one-third of the capital.

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The parties of the second and third parts were each to receive one-third of the profits, to furnish one-third of the capital, bear and pay one-third of all expenses in conducting said business, and one-third of all losses which might happen or occur. The learned court held that the defendant's liability must be measured by this agreement, and could not exceed one-third of the debts of the old firm. In this conclusion the learned judge was clearly right. The agreement contained the terms on which the defendant became a member of the firm, and expressed the full extent of her obligation, whether it inured to the surviving members of the old firm or to its creditors. The plaintiff's appeal must, therefore, in any view of the case, fail. If he could maintain an action at all, it could be only for the one-third which came within the terms of the agreement. But the defendant also appeals. Her contention is that the plaintiff's contract was with the members of the old firm; that there has been no change of credit, not even a communication with her, much less a promise on his part to accept her as his debtor. Upon the record before us that contention is well founded, and the adjudged cases show that without some one of these things being done, or some analogous act on the part of a creditor, he cannot maintain an action on such an agreement as that by which the defendant bound herself. Here it is apparent that the obligation of the defendant to her copartners is the only foundation for the plaintiff's action, and there is no circumstance in the case to exempt him from the general rule of law that one who is not a party to a contract cannot sue in respect of a breach of duty arising out of the contract. Moreover, our decision in *Wheat v. Rice* (97 N. Y. 296), is justly relied upon as controlling the disposition of this case. In that the undertaking of the defendant was to "assume and pay one-quarter of all the indebtedness" of the firm named. In this the defendant jointly, with her son, promised "to pay one-third of the liabilities of the late firm." The cases cannot be distinguished, and the principle applied in that cited would seem to require the reversal of the judgment, if the defendant was in condition to avail herself

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of it. It is obvious, however, from the record, that no such question was raised at the trial term, and, so far as appears, the point is taken for the first time in this court. This will not do. Had it been raised in season it might perhaps have been obviated. In such a case it is well settled that an exception not taken in the court below cannot be available on appeal. The defendant's appeal must, therefore, also fail, and the judgment of the General Term be affirmed

All concur.

Judgment affirmed.

107	206
111	680
107	228
112	321
112	527
112	528

In the Matter of the Estate of JOHN B. PAGE, Deceased.

A citation was issued by the surrogate of the county of New York to the widow and next of kin of an intestate, notifying them of an intended application by the public administrator for letters of administration. Upon the day and hour named in the citation, the counsel for the widow and next of kin appeared before the surrogate to oppose; but there was no appearance on the part of the public administrator. Said counsel remained in court until after the second call of the calendar and was then informed by the surrogate that there was no such application on the calendar. No application was made on that day, but subsequently, and without notice to said counsel and in his absence, the application was made and granted. *Held*, that the order was void; that no order having been made on the return day of the citation, either adjourning the hearing or determining the matter, the surrogate lost jurisdiction to proceed further, without either due service of another citation or a voluntary appearance of the widow and next of kin.

A motion to revoke the letters was denied by the surrogate and his order was affirmed by the General Term. *Held*, that as the decisions below showed a fair justification for the conduct of the public administrator, and as his good faith was not questioned, the taxable costs of the proceedings should be paid out of the estate.

It seems that under the provision of the New York Consolidation Act (§§ 219, 220, Chap. 410, Laws of 1882), the public administrator has no right of administration upon the estate of one dying intestate, without the state, leaving effects within the county of New York, who was not a citizen of the state.

Under the provisions of the Revised Statutes, however (2 R. S. 74, § 27), which in this respect have not been repealed by the Code of Civil Pro-

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cedure, the public administrator has a right of administration, contingent upon the refusal of others who have a prior right.

The widow and next of kin of a citizen of the United States, but a non-resident of this state, dying intestate out of the state, leaving personal property in said county, are entitled to letters of administration in the order of priority named in the statute.

It is not necessary, however, that they should initiate the proceedings; the public administrator may, and, in case of their neglect, it is his duty to do this, and if after proper service of a citation, upon hearing on his application, it appears there is a widow or relative competent, qualified and willing to take, letters must be issued to such person; if this does not appear the public administrator is entitled to administration, at least where there are creditors of the decedent in said county.

(Argued October 4, 1887; decided November 29, 1887.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made December 31, 1886, which affirmed an order of the surrogate of the county of New York, denying a motion on the part of the widow and next of kin of John D. Page, deceased, to set aside and revoke letters of administration issued by said surrogate to the public administrator.

The said intestate was a non-resident of this State; he died at Rutland, Vermont. The further facts appear in the opinion.

Alfred R. Page for appellants. The application for letters not having been made in pursuance of the notice authorized by statute, the surrogate had no power to grant the same. (N. Y. Con. Act, 1882, §§ 227, 228; *Proctor v. Wanmaker*, 1 Barb. Ch. 302.) The public administrator had no right to letters of administration in this case, the intestate having been a citizen of the state of Vermont, and having died in that state. (Code of Civ. Pro., § 2695 *et seq*; 3 R. S. [7th ed.], 2290.)

Lewis Sanders for respondent. The petition of the public administrator on which the letters of administration were issued to him, recites all the facts necessary to confer jurisdiction upon the Surrogate's Court. Those facts were the death of the decedent, his intestacy, and the presence in this county at the time of his death or afterwards of effects belonging to his

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estate. (Code of Civ. Pro., § 2476; Laws of 1882, chap. 410, § 219, subd. 1; *Bloom v. Burdick*, 1 Hill, 130; *Bumstead v. Read*, 31 Barb. 661; *Shelden v. Wright*, 5 N. Y. 497; *Farley v. McConnell*, 52 id. 630; *Roderigas v. Institution*, 76 id. 316; *Leonard v. Company*, 84 id. 48; Code, § 2478; *N. Y. L. I. Co. v. U. L. I. Co.*, 88 N. Y. 424; *Anon.*, 6 Cow. 41; *Tyler v. Aetna Ins. Co.*, 2 Wend. 280.) The appellants being non-residents, had the notice the law entitled them to, by the publication of the notice twice a week for four weeks in the Daily Register. (Laws of 1882, chap. 410, § 227; *In re Brewster*, Daily Register, Aug. 26, 1886.)

PECKHAM, J. The citation to the widow and next of kin of the deceased was to inform them of an intended application by the public administrator of New York city to the surrogate of the county for letters of administration upon the estate of the intestate named in the citation, and it was stated that such application would be made to the surrogate, at the court-house, and at a certain day and hour. This citation was issued pursuant to statute, and was necessary, under the circumstances, to give jurisdiction to the surrogate to make any order in the proceeding.

When, upon the day and hour named in the citation, the counsel for the widow and next of kin of the deceased appeared before the surrogate ready, as is stated, to oppose the application, there was no appearance on the part of the public administrator. This is not disputed. The counsel for the widow says that no application was made to the surrogate for the granting of any letters of administration upon this estate at that time. He further says that he remained in court until after the second call of the calendar, and was then informed by the surrogate that there was no such application upon the calendar for that day. He then left the court-house, and in truth no application was made to the surrogate on that day. Subsequently, and without notice to the counsel for the widow, and in his absence, application was made to the surrogate for the issuing of letters to the public administrator, and

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the same was granted. It is thought that where no one appeared upon the return day of the citation on behalf of the public administrator, and when the counsel for the widow did appear and was then ready to oppose the granting of such application, and no order was made in the proceeding at that time, the surrogate lost jurisdiction to proceed further without either the due service of another citation or the voluntary appearance of the widow and next of kin. Their counsel had done all that he could be expected to do when he appeared for them, as cited, and was ready to oppose the application. If no one appeared upon the other side, and no order was made in the case, the proceeding went down, and nothing further could be done without due notice.

We cannot agree that in such event the matter stood over ready to be heard whenever, in the ordinary course of the business of the court, it should be brought to the attention of the surrogate. The surrogate might have made an order adjourning the case to some specified time, and thus retained jurisdiction, but he did nothing of the kind, and the proceeding was simply out of court.

This necessitates the reversal of the order of the General Term and of the surrogate, and the entry of an order in the Surrogate's Court annulling and setting aside and revoking the letters of administration heretofore granted to the public administrator of New York.

The learned counsel for the widow contends, however, in his argument, and in his brief filed here, that the public administrator had no right to letters of administration in this case, as the deceased, at the time of his death, was a citizen of Vermont and died within that state. He does not claim that a case was not made out conferring jurisdiction upon the surrogate of New York to issue letters of administration upon this estate to the proper person and after a proper application, but he claims that the Surrogate's Court had no right to grant letters to the public administrator. As this question may arise in any future application in this case, it is better to state briefly our views regarding it now.

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We agree that section 220 of the New York Consolidation Act (chap. 410 of the Laws of 1882), limits the sweeping provisions of subdivision 1 of section 219, so that the public administrator, under the subdivision of that section, has no right of administration upon the estate of one who was not a citizen of this state, dying intestate without the state, leaving effects within the county of New York, except in cases mentioned in the two subdivisions of section 220, and this proceeding is not brought within either exception. There are, however, cases where the public administrator has a contingent right of administration, after the refusal of others who have a prior right. By the Revised Statutes, which upon this subject have not been repealed by the Code, it is provided (2 R. S., 74, § 27) that letters of administration, in case of intestacy, shall be granted to the relatives of the deceased if they will accept the same in the following order: First to the widow, second to his children, etc. If none of these will accept, then it is provided that the creditors of the deceased shall be entitled to administration, but "in the city of New York the public administrator shall have preference after the next of kin over creditors and all other persons."

The widow and next of kin in this proceeding while non-residents are citizens of the United States, as we may assume, and hence are entitled to letters in the order of priority named in the statute. (2 R. S. 74, 75, §§ 27, 32.) But it is not necessary that they should initiate the proceedings. The public administrator, under section 227 of the above mentioned consolidation act, could himself give notice of an application for letters, and after proper service thereof and on the hearing of the application, if it appeared that there was a widow or a relative competent and qualified and willing, letters of administration would be granted to such widow or relative, and if not, then the public administrator has the right to administer by the very terms of the Revised Statutes already quoted.

If no application should be made by the widow or next of kin within a reasonable time, either for original or ancillary

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letters of administration upon the property here which was left by a deceased person, not a resident of the state, and who died outside of its limits, it would, we think, be the duty of the public administrator to himself, on proper notice, make application for letters and proceed as provided in the statute.

Reading sections 227 and 228 together, it is seen that the statute contemplates the making of the application by the public administrator, even in cases where, on the hearing, it may appear that there are persons willing, qualified and competent to take out letters. In such case the letters are issued to them, but the proceedings may be commenced by the public administrator, and he has such right evidently for the purpose of expediting, by his application, the issuing of letters to some one, and the placing of the property situated in New York, and which belonged to the deceased, in a way for proper administration.

Our decision is limited to the exact facts in this case. It is assumed there are creditors of the estate, living in the city of New York, who are anxious for the appointment of an administrator in this state. As to what right, if any, the public administrator would have to claim that an appointment should be made either of himself or others, in case there were no creditors in the county of New York or none who desired the appointment of an administrator, we do not decide.

For the reasons above given, the order of the General Term and of the surrogate refusing to revoke the letters issued to the public administrator should be reversed, and an order made revoking and annulling such letters.

In regard to costs, we think they should be paid out of the estate, for the reason that the General Term and the surrogate both held that the letters were valid and should not be revoked, thus affording fair justification for this conduct on the part of the public administrator, and where, as in this case, his entire good faith is not questioned, it seems proper to make such a disposition of the costs of the proceeding. To that end leave is granted to the public administrator upon the appointment of

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an administrator of this estate, to apply to him for the payment of the taxable costs of the proceeding.

All concur.

Ordered accordingly.

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THE ITHACA AGRICULTURAL WORKS, Appellant, v. JUDAH EGGLESTON, ALDEN D. EGGLESTON, Contestant, Respondent.

As to whether an appeal lies to the Supreme Court from an order made by a County Court in an action in which a transcript was filed from Justice's Court, *quære*.

A transcript of a Justice's Court judgment for \$310.69 was filed in the county clerk's office. After the expiration of five years a motion was made by plaintiff in the County Court for leave to issue execution. On the hearing of the motion defendant did not appear, but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment, under and by virtue of an assignment executed by plaintiff's general agent. The matter was referred to a referee, who reported that plaintiff made an agreement in writing to sell the judgment, and that there was no fraud inducing it. The court, on hearing counsel for plaintiff and the contestant, the defendant not appearing, confirmed the report, denied plaintiff's motion, with costs to the contestant. *Held*, that it was a special proceeding within the meaning of the Code of Civil Procedure (§ 1357), and that the order was appealable to the Supreme Court. *Kincaid v. Richardson* (25 Hun, 237); *Andrews v. Long* (79 N. Y. 573), distinguished.

(Argued October 4, 1887; decided November 29, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made November 9, 1886, which dismissed an appeal from an order of the County Court of Chenango county, denying a motion to set aside the report of a referee and for leave to issue execution.

The material facts are stated in the opinion.

E. Countryman for appellant. The appeal to the General Term was authorized and the order was appealable. (*Kincaid v. Richardson*, 25 Hun, 237.) This was a special proceeding. (Code, § 1357; *Wadley v. Davis*, 38 Hun, 186; *Belknap v.*

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Waters, 11 N. Y. 477.) The order appealed from affected a substantial right. (*Betts v. Garr*, 26 N. Y. 383; *Baldwin v. Roberts*, 30 Hun, 165.) The judgment, when docketed, became a judgment of the County Court. (*Belgard v. McLaughlin*, 44 Hun, 558; *Vedder v. Lansing*, id. 590.) If there was an agreement to assign this judgment, and there is a breach of that agreement, Alden B. Eggleston has his remedy by action. (*Betts v. Garr*, 26 N. Y. 383; *Lee v. Watkins*, 3 Abb. Pr. 243; *Mereness v. Brennan*, 7 N. Y. Week. Dig. 24; *Rose v. Henry*, 37 Hun, 397; *Smith v. McGowan*, 3 Barb. 404; *Frink v. Morrison*, 13 Abb. Pr. 80.) Upon application for leave to issue execution under section 284 of the Code, the court cannot go behind the judgment, or inquire into its validity. (*Lee v. Watkins*, 3 Abb. Pr. 243.) The statute of limitations cannot be interposed as a defense to such a motion. (*Rose v. Henry*, 37 Hun, 379.) The contestant cannot enforce specific performance of the agreement on this motion. Before that is done he must bring an action, and the plaintiff is entitled to a trial by jury. (*Van Etten v. Hasbrouck*, 25 N. Y. Week. Dig. 283; 26 id. 85; *Howland v. Ralph*, 3 Johns. 20; *Myers v. Kelsey*, 19 id. 197.)

Fancher & Sewall for respondent. The appeal to the General Term was not authorized. It was not allowed by section 1342 of the Code of Civil Procedure. (*Andrews v. Long*, 79 N. Y. 573; *Fish v. Thrasher*, 21 Hun, 15; *Perry v. Round Lake*, 22 id. 293; *Roberts v. Marson*, 21 id. 363.) It was a discretionary order with the County Court and not reviewable at General Term. (*Stibbons v. Cowles*, 30 Hun, 523; *Kugelman v. Rhodes*, 36 id. 269; Code of Civil Pro. § 1377, subd. 2; *Sherman v. Strauss*, 52 N. Y. 404.) The appeal to this court is not authorized and cannot be sustained. (Code, § 191; *Marvin v. Seymour*, 1 N. Y. 538; *Brown v. Brown*, 6 id. 106; *Pugsley v. Kisselburgh*, 10 id. 421; *Younghanse v. Fingar*, 47 id. 99.) The order was a discretionary one of the County Court, and not appealable to this court. (*Powell v. Mills*, 53 N. Y. 322; *Bolles v. Duff*, 43

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id. 469; *Anon.*, 59 id. 315; *In re Kings Co. El. R. R. Co.*, 82 id. 95; *Sherman v. Strauss*, 52 id. 404; *Underwood v. Green*, 56 id. 247; *B'k of Genesee v. Spencer*, 18 id. 150; *Lawrence v. Farley*, 73 id. 187; *Beards v. Wheeler*, 79 id. 213; *People v. Campbell*, 72 id. 496; Code Civil Pro. § 190, subd. 2.) No party has a substantial right to an order that an execution issue after the lapse of five years on motion. (*Footte v. Lathrop*, 41 N. Y. 358; *Brinkerhoff v. Marvin*, 5 John. Ch. 320; *Beards v. Wheeler*, 76 N. Y. 213; *Miller v. Earle*, 24 id. 112.)

PECKHAM, J. On the 17th of January, 1878, the plaintiff obtained a judgment against the defendant, Judah Eggleston, by confession, in the court of a justice of the peace in Chenango county, for the sum of \$310.69. A transcript of this judgment was filed in the clerk's office of that county on the 18th day of January, 1878. In September, 1883, the plaintiff's attorney noticed a motion for leave to issue execution, and in the affidavit upon which the motion was to be made, the foregoing facts were stated. It was also therein stated that the plaintiff was then the owner of such judgment, and that the same was then wholly unpaid; that five years had elapsed since the docketing of such judgment and the filing of a transcript thereof, and that no execution had ever been issued on such judgment. The motion was noticed for a term of the Chenango County Court, and the papers were duly served on the defendant Judah Eggleston. Upon the hearing of the motion the defendant did not appear, but one Alden B. Eggleston (called the contestant) appeared by his counsel and made an affidavit that he was the owner of the judgment by assignment from the plaintiff through its general agent. The motion was ordered to stand over, and permission was given to the plaintiff and contestant to furnish further evidence concerning the alleged assignment. Pursuant to such order the plaintiff and the contestant, Alden B. Eggleston, appeared before the County Court on the adjourned day, and each read further affidavits upon the question. The original defendant

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still failed to appear, and the whole contest was carried on as against the plaintiff by the contestant, who insisted that he was the owner of the judgment. The County Court, feeling unable to decide that question upon the conflicting affidavits, ordered a reference to take the evidence of the parties and their witnesses upon the several issues, among them upon the issues of ownership and of fraudulent representations made by the contestant to the plaintiff's general agent to induce the assignment.

The referee heard the testimony and made a report in which he found that plaintiff made an agreement in writing to sell the judgment to the contestant upon certain terms, and that there was no fraud.

It does not appear that the agreement was ever carried out, but on the contrary it would seem never to have been. On this report of the referee a motion was made to confirm it, and on hearing counsel for the contestant and for the plaintiff, the defendant still not making any appearance, the County Court confirmed the report of the referee and denied the motion of the plaintiff to set it aside and for leave to issue execution, and granted ten dollars costs to the contestants besides disbursements to be taxed against the plaintiff. From that order of the County Court the plaintiff appealed to the General Term of the Supreme Court, and that court, after argument, dismissed the appeal as not appealable, and from that order the plaintiff has appealed here.

It is said that the order of the County Court was not appealable under sections 1340 and 1342 of the Code, because it was not an order made in an action brought in or taken by appeal to the County Court. It is true the original action was brought in a Justice's Court and judgment was entered therein by confession, but a transcript was filed in the County Court, and thenceforth the judgment, by the terms of the statute, is deemed a judgment of the County Court and must be enforced accordingly. (Code, § 3017.) Whether such a case is not within the plain meaning of the statute regulating appeals to the General Term from a County Court is a question not free

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from doubt. If not thus included there might be numerous cases where no appeal would lie from an order of the County Court, and which were yet entirely within the principle upon which appeals are given to the Supreme Court in analogous cases. If necessary to the decision of this appeal we should hesitate before deciding that no appeal lies to the Supreme Court from an order made by the County Court in an action in which a transcript was filed from Justice's Court.

In this case, however, we think an appeal from the order lies to the Supreme Court under section 1357 of the Code. We think this was substantially a special proceeding within the meaning of that section. The contest, by the order of the County Court, acquiesced in by both sides, became one between the plaintiff on the one side and Alden B. Eggleston on the other. The original proceeding was instituted pursuant to a special statutory provision, and was continued against one who was not a party to the action, but was served with notice and the contest was carried on under the order of the court. For all purposes of an appeal from the order made by the County Court, it was a special proceeding. The facts distinguish this case from *Kincaid v. Richardson* (25 Hun, 237) and *Andrews v. Long* (79 N. Y. 573). In the former case the proceeding was between the original parties to the action, and hence we are not called upon to assert or deny the correctness of that decision. In the latter case, and under section 1342 of the Code, as it then stood, it was held by this court that no appeal would lie to the General Term from an order of the County Court, made in an action which was not brought in that court, but was taken there by appeal from a Justice's Court. Whether there can be any solid distinction between such a case and the case of the filing of a transcript, as above stated, we need not now decide nor do we now mean to decide that an ordinary application to the court in which the judgment was obtained for leave to issue execution, where the parties are all living, is a special proceeding instead of a summary application in an action after judgment. Our decision is confined strictly to the facts of this case.

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Holding that the order of the County Court was appealable, it follows that the order of the General Term dismissing the appeal should be reversed, with costs, and the appeal should be heard upon its merits by that court.

All concur.

Ordered accordingly.

CHARLES L. PICKETT, Appellant, v. EDWARD B. BARTLETT et al., Respondents.

Plaintiff's assignor leased to defendants a bonded warehouse and other premises for a term of one year from November 1, 1880, the lessees covenanting to surrender at the end of the term, to pay the rent for the term and "for such further time" as they may hold the premises. Bonded goods belonging to defendants and placed in the warehouse before the expiration of the term, were left there until December 23, 1881, in consequence of defendants' inability to remove them without the consent of the government officials. On that day the government locks were removed, the goods taken away and the keys of the buildings were left at a place designated by plaintiff. Plaintiff claiming that by the holding over he had the right to elect to hold the lessees for another year upon the terms of the lease, brought this action to recover the rent. *Held*, that, it appearing by the lease, the parties anticipated a holding over by the tenants and expressly provided for it, the holding over was not wrongful or such as enabled the landlord at his option to treat the tenants as wrongdoers or hold them for the rent of the second year, and that they were only liable up to the time of the surrender of the premises

Schuyler v. Smith (51 N. Y. 309) distinguished.

(Argued October 6, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 7, 1885, which affirmed a judgment in favor of defendants entered upon a verdict. (Reported below, 13 Daly, 229.)

The nature of the action and the material facts are stated in the opinion.

Charles H. Knox for appellant. The term of a lease is fixed by the *habendum* clause, and cannot be increased by a covenant on the part of defendants alone. (McAdam on Landl. and

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Ten. 55, § 37; id. 187, § 103; *Burchell v. Clark*, 2 C. D. P. 88; *Blair v. Osborne*, 84 N. C. 419; 2 Platt on Leases, 47; 3 Washb. on R. P. [3d ed.], 372, 375, 436; *W. Trans. Co. v. Lansing*, 49 N. Y. 503, 509; *Abeel v. Radcliff*, 13 Johns. 296; *Pugsley v. Aiken*, 1 Kern. 494; *Lounsbery v. Snyder*, 31 N. Y. 514; *Drake v. Seaman*, 96 id. 230; *Wright v. Weeks*, 25 id. 153; *Peabody v. Speyer*, 56 id. 230; *Blossom v. Griffin*, 3 Kern. 569; *Stone v. Browning*, 68 N. Y. 598; *Buckmaster v. Thompson*, 36 id. 558.) It is the duty of a tenant as soon as his tenancy expires by its own limitation, to surrender the possession of the whole of the demised premises, together with all the buildings belonging thereto, to his landlord, or to some one authorized by him to receive them. If he neglects or refuses so to do, even though he retains them but for a few days, with the intention of removing, the landlord may treat him as a tenant for another year at the same rent, and payable at the same times in the year, and in the same way as the lease provided for the previous year. (*Schuyler v. Smith*, 51 N. Y. 309; *Laughran v. Smith*, 75 id. 205; *Witt v. Mayor, etc.*, 6 Robt. 441; *McAdam's Landl. and Ten.* [2d ed.], 32; 4 Wait's Act. and Def. 218; *Austin v. Strong*, 47 N. Y. 679; *Reeder v. Sayre*, 70 id. 180; *Girard's Tit. to R. E.* 198.) Permission to remain longer would be a new agreement, and must be pleaded and set up as an affirmative defense. (*McKyring v. Bull*, 16 N. Y. 297; *Henegger v. Wettstein*, 94 id. 252.) On the 1st of November, 1881, as the defendants had their goods on the premises which were then bonded to the government, and it would have been a criminal offense under the United States law to interfere with them, punishable by imprisonment, by operation of law on the undisputed facts the landlord was entitled to hold the tenant for a year under the terms of the lease. (U. S. R. S., § 2998; *Schuyler v. Smith*, 51 N. Y. 309; *Scott v. Stebbins*, 91 id. 615.) A surrender of the keys was necessary for the purpose of yielding up possession of the premises. (*Gibbons v. Dayton*, 4 Hun, 451; *Little v. Martin*, 3 Wend. 219; *McAdam's Landl. and Ten.* [2d ed.], 65.)

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W. W. Goodrich for respondents. Promises in law exist only in the absence of express promises. (1 Chitty on Cont. [11th Am. ed.], 89.) The rule of construction is to discover and give effect to the intention of the parties; so that performance may be enforced according to the sense in which they mutually understood it at the time it was made. (1 Chitty on Cont. [11th Am. ed.], 104, 105.) Even if the provision for holding over had not been inserted in the contract, the tenant would have had the right to explain that his holding over was not voluntary, but compulsory. (*Smith v. Alt*, 7 Daly, 492; *Tuomay v. Dunn*, 42 N. Y. Super. Ct. R. 291; 1 Greenl. on Ev., § 33.) Every demise between landlord and tenant in respect of matters as to which the parties are even silent, may be fairly open to explanation by the general usage and custom of the country or the district where the land lies. (Broom's Legal Max. [7th ed.], 663.) Effect must be given to every part of the contract. (*Ward v. Whitney*, 8 N. Y. 446; *Hamilton v. Taylor*, 18 id. 361; *Wood v. Sheehan*, 68 id. 368; *Holmes v. Hubbard*, 60 id. 185; *W. N. Y. L. I. Co. v. Clinton*, 66 id. 331.) The doctrine of *Schuyler v. Smith* (51 N. Y. 309) does not apply to this case as the holding over was not wrongful. (*Smith v. Alt*, 7 Daly, 492; *Tuomay v. Dunn*, 42 N. Y. Super. Ct. R. 293.)

DANFORTH, J. On the 1st day of November, 1880, the plaintiff's assignor demised to the defendants certain premises, and among others a bonded warehouse known as the Baltic stores. The lease was executed by both parties and after a description of the property contained these words: "To have and to hold the above described premises for the term of one year from the 1st day of November, A. D. 1880, yielding and paying therefor the rent of sixty-five hundred (\$6,500) dollars per year. And the said party of the second part hereby agrees and promises to pay the said rent in equal quarterly payments, and to quit and deliver up the premises to the party of the first part, or its attorney, peaceably and quietly at the end of said term in as good order and condition, reasonable

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use and wearing thereof excepted, as the same now are, or may be put into by the party of the first part, and to pay the rent for said term, and also for such further time as the party of the second part may hold the same, and not make or suffer any waste thereof."

The plaintiff alleged by his complaint that the year for which the premises were demised to the defendants ended on the 1st day of November, 1881, but notwithstanding that "the defendants continued in occupation and possession, and did not surrender nor offer to surrender possession thereof, but held over," and the lessors elected to hold them as tenants for another year. After its expiration and in February, 1884, this action was brought to recover rent alleged to be due for the last three-quarters of the second year. At the trial it appeared that bonded goods belonging to the defendants' customers and placed by them in the stores before November 1, 1881, were left there until December 23, 1881, in consequence of defendants' inability to remove them without the consent of the government officials. On that day the government locks were removed the defendants' bond as warehousemen canceled, padlocks put on the doors and the keys left at the office of the American Tack Company, where, in a certain contingency, the plaintiff had directed they should be left.

There was evidence by parol and otherwise tending to show a surrender of the premises at the expiration of the term, and that question was litigated. At the close of the evidence each party requested the court to direct a verdict in his favor, but the learned trial judge submitted the case to the jury as one in which a verdict either way might in one or another view of the evidence be warranted, saying, "all that you have to decide is whether the defendants surrendered those premises at the time stated. If they did this suit, being to recover rent after that time, cannot be maintained." The jury found for the defendants. The Special Term denied a new trial, and after judgment of affirmance by the General Term, the plaintiff appeals to this court.

The learned counsel for the appellant contends that the

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case turns on the proper construction of that portion of the lease above quoted, his claim being that "the legal effect of the holding over was, at the election of the lessor, to make the lessees liable for another year's rent, payable at the same times in the year and in the same way as the lease provided for the previous year," thus invoking the benefit of the rule which, in favor of the landlord, implies an agreement as by tacit consent, that the tenant who holds over after the expiration of his term, shall be deemed to hold for a year upon the terms of the prior lease. His principal argument is that the covenant of the lessee to pay for "such further time," after the expiration of the year, as he shall hold the premises, must, so far as it implies a limitation, be disregarded and give place to the legal implication already referred to. But the agreement is to be construed by the intention of the parties at the time of making it, as that intention may be gathered from its subject matter and the terms in which it is expressed. The lease related to a bonded warehouse which by the provisions of law must, while occupied in that character, be used solely for the purpose of storing warehoused merchandize, and be placed in charge of an officer of the customs, who, together with its owner and proprietor, should have the joint custody of all the merchandize stored therein (U. S. Rev. St. § 2960.) Its use was subject to governmental regulation, and it was as to receipt, storage and delivery of merchandize from it, altogether removed from the control of the lessee. It may well be that these considerations furnished a reason for the clause which purports to limit the lessees' liability for rent to such time beyond the year as they should actually hold the premises. The plaintiff relies upon an implied promise, but the lease contains an express covenant and to it the implied promise must yield. The lease does not continue in force beyond the term of one year specified in and created by it, and the holding over must be deemed to have been on the defendants' covenant solely. For the term of one year they agree to pay the specified rent, and also to pay the rent for such further time as they may hold the premises. Thus the parties anticipated a holding by the

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tenants beyond the term and expressly provided for it by agreement. It, therefore, was not wrongful, nor such a holding over as makes the tenant a wrong-doer and enables the landlord, at his option, to treat him as a trespasser or hold him for the rent of a second year.

In *Schuyler v. Smith* (51 N. Y. 309), cited by the appellant, there was no agreement in reference to a holding after the expiration of the term, and the principle upon which that case turned, has no application here. Nor do the other cases cited by the appellant require any different conclusion.

Western Transportation Company v. Lansing (49 N. Y. 499) was an action for specific performance, by the landlord, of a covenant not unlike the present, and which the lessee claimed entitled him to renewal of the lease for a term like that originally granted. But the court held he was not entitled to it, and the whole reasoning of the judge in that case aids the defendants here, for it shows that the implications upon which the plaintiff relies cannot be indulged in.

Other propositions are argued by the appellant and have been examined. We do not find that they point to any error in the judgment of the court below. It should, therefore be affirmed.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

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114	386

WILLIAM R. COOPER, JR., Appellant v. THE HONG KONG AND SHANGHAI BANKING CORPORATION, Respondent.

M. D. & Co., shipped certain sugars at Manilla for New York, taking bills of lading therefor, transferable to their order on payment of the freight; these bills said firm indorsed in blank and delivered to defendant to secure the acceptance and payment of bills of exchange drawn by the consignors and discounted by defendant. The bills were accepted, and at the request of the drawees, defendant, through its New York agent, delivered the bills of lading to plaintiff, receiving his receipt therefor, which contained an agreement on his part to store the sugars as defendant's property as soon as landed in a public warehouse, delivering warehouse receipts to be retained by defendant's agent until the acceptances were paid or provided for. The intention of the arrangement, it was stated, was "to

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protect and preserve unimpaired the lien of the bank or its agent on said merchandise." Plaintiff was a commission merchant in New York and had acted as such for M. D. & Co., in the sale of goods sent by that firm to New York for sale. His practice had been to advance moneys to pay the freight on goods sent by said firm to New York, when received, to sell the same, reimburse himself for the advances and account for the net proceeds. To obtain possession of the sugars on arrival, plaintiff was required to and did pay the freight; he caused them to be entered in the custom house and placed in a public warehouse, taking warehouse receipts in his own name. *Held*, that plaintiff was entitled to have the sum so paid refunded before defendant was entitled to the property; that the latter, whether regarded as pledgee or owner, had the right of possession only on payment of the freight; that plaintiff stood in no position toward M. D. & Co., which made it his duty to advance the money out of his own funds and trust to the personal credit of that firm for repayment; that the receipt required plaintiff to receive the property from the carrier on arrival and store it as the defendant's property, and when defendant thus permitted plaintiff to take the property it became obligated to repay the expenses actually and necessarily incurred by the latter in the performance of his agreement; that the agreement was fully carried out when the lien of the bank was kept exactly in the same state it was in when the arrangement was made.

It seems there is no unvarying rule of law making it the duty of a commission merchant to advance from his own pocket moneys due for freight on property consigned to him by his principals.

(Argued October 6, 1887; decided November 29, 1887.)

APPEAL from that portion of a judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 28, 1885, which modified and affirmed as modified a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 13 Daly, 183.)

The nature of the action and the material facts are set forth in the opinion.

John M. Bowers for appellant. The plaintiff, as the bailee of the defendant, had a lien upon the goods paramount to any claim of the latter. (*Dows v. Greene*, 24 N. Y. 638; *Smith v. Smith*, 2 Strange, 955; 2 Kent's Com. 440, 558; 2 Blacks. Com. 452; Jones on Bailm. 117; Story on Bailm. § 2; Phillips on Liens, § 476.) The trust receipt established, as between the plaintiff and the defendant, the relation of principal and

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agent or trustee and *cestui que trust*. (*Fowler v. N. Y. G. Ex. B'k*, 67 N. Y. 138, 145, 146; Story on Agency, § 373; *Powell v. Trustees, etc.*, 19 J. R. 284; Perry on Trusts, § 910; *Cowdry v. G. R. R. Co.*, 93 U. S. 352; *Noys v. Blakeman*, 6 N. Y. 567; *Randall v. Dusenbury*, 39 Super. Ct. R. 174; *Fowler v. Mut. L. Ins. Co.*, 28 Hun, 199; Edwards on Factors and Banks, §§ 71, 73; Story on Agency, §§ 58, 98.) There is nothing in the trust receipt to negative plaintiff's lien for advances. (*Noonan v. Bradley*, 9 Wall. 394; *Hooper v. Wells, Fargo & Co.*, 24 Cal. 11; *St. L. & Co. R. R. Co. v. Sunick*, 49 Ind. 302; *Menzell v. R. R. Co.*, 50 N. Y. 661; Broom's Legal Maxim, [7th Am. ed.], 596, 599, note 4; *Eddis v. Burry*, 6 B. & C. 433.) The defendant being benefited to the extent of the freight paid, and the plaintiff having paid the same, and the defendant's lien remaining exactly as it was before such payment, the plaintiff is entitled to receive the same back out of the proceeds of the goods when sold, and in the case at bar, out of the deposit in the Trust Company. (*Rice v. Payne D. & Co.*, 53 Law T. [N. S.] 932; *Lee v. Bowen*, 5 Biss. 154; *B'k of R. v. Jones*, 4 N. Y. 497; *Winter v. Coit*, 7 id. 283, 293; *Ind. N. B'k v. Colgate*, 4 Daly, 41, 52; *First Nat. B'k of Cin. v. Kelly*, 57 N. Y. 37.) The plaintiff should be subrogated to the rights which the carriers had for their freight as against the defendant's interest in the goods. (Sheldon on Subrogation, § 1; *Grosvenor v. Phillips*, 2 Hill, 147; *Holbrook v. Wight*, 24 Wend. 169; *Morse v. Peasant Bros.* 7 Bosw. 199; *Ackerman v. Redfield*, 9 Hun, 378; *Davesin v. City B'k*, 57 N. Y. 81; *Seggart v. Scott*, 6 Esps. 22; *Dart v. Ensign*, 47 N. Y. 619, *Downer v. Fox*, 20 Vt. 388; *Flacks v. Kelly*, 30 Ill. 462; *Wall v. Mason*, 102 Mass. 316.)

Amasa A. Redfield for respondent. Whether Cooper be considered the mere *alter ego* of Martin, Turner & Co., or an independent third person, advancing money to pay the freight, he was bound, under his agreement, to redeliver the goods, freight paid, to the bank, or else pay the bank's claim. He cannot hold the property to secure a general balance due to

him, for the conditions on which he accepted the property are inconsistent with his holding a lien on the proceeds. (*Reynolds v. Davis*, 5 Sandf. 267; *Dodge v. Wilbur*, 10 N. Y. 582; *Goodhue v. McCarty*, 3 La. Ann. 447; Story on Agency, § 362.) If Cooper can be deemed to have made the advances out of his own funds upon the security of the goods, his subsequent obtaining of Martin, Turner & Co.'s acceptances for the amount of his advances (and for very much more than the amount) was, in legal effect, a substitution for his lien. It extinguished any lien he may have had on the goods, certainly as against the defendant bank. (*Fielding v. Mills*, 2 Bosw. 489; *W. Mfg. Co. v. Huntley*, 8 N. H. 441; *Trust v. Parson*, 1 Hilton, 293.)

PECKHAM, J. The plaintiff in this action obtained judgment against the defendant for \$17,371.81 damages and costs, which judgment was entered upon the report of a referee. The defendant appealed from that judgment to the General Term of the Common Pleas of the city of New York, and that court modified the judgment by deducting therefrom \$15,977.41, leaving but \$1,394.40 in favor of the plaintiff. From the judgment so modified the plaintiff has appealed to this court.

The referee found the following among other facts: The plaintiff is a general commission merchant in the city of New York, and the defendant is a foreign corporation; that there was a firm of Martin, Dyce & Co. doing business as merchants, at Manilla, in the Philippine Islands, and that firm was composed of the same persons as the firm of Martin, Turner & Co., doing business as bankers in Glasgow, Scotland; that about the 20th of August, 1883, Martin, Dyce & Co. were the owners of a large amount of sugar which they were intending to ship to the city of New York and thence to Canada; that they placed the sugar on board the ship *Henrietta* and took bills of lading therefor transferable to their order on payment of the freight, and these bills of lading they indorsed in blank. For the purpose of realizing on the sugar as early as possible Martin, Dyce & Co. drew four bills of exchange addressed to Martin, Turner

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& Co., requesting them to pay to the order of the defendant corporation, six months after sight, the aggregate sum of nineteen thousand and some odd pounds sterling, and to charge the same to the account of the sugar shipped by the Henrietta to New York; that on the 17th of October, 1883, each of these bills was accepted in writing by Martin, Turner & Co., payable in London; that at the time of the making and delivery of these bills of exchange to the defendant corporation, and as collateral security for the due acceptance and payment at maturity of the same, Martin, Dyce & Co. delivered to it the bills of lading indorsed in blank by them for the sugar shipped on board the Henrietta; that about the 5th of November, 1883, Martin, Turner & Co., at Glasgow, wrote to the defendant corporation at London and asked it to forward to the plaintiff at 168 Pearl street, New York, through its agency in that city, the shipping documents for the sugar shipped *per* Henrietta, which had been hypothecated to such defendant relative to the acceptance of Martin, Dyce & Co., amounting to nineteen thousand and some odd pounds sterling, as above stated. The letter further stated that in exchange for these shipping documents the plaintiff would give the defendant a letter of obligation, undertaking to hold the sugar on its account and pay to it the proceeds when realized; that on the 19th of December, 1883, the plaintiff received from the New York agent of the defendant corporation the bills of lading above mentioned for the said sugar, and at the same time the plaintiff delivered a receipt therefor a copy of the material portion of which is as follows:

“NEW YORK, 19th December, 1883.

“Received from the agent Hong Kong and Shanghai Banking Corporation, bill of lading and invoice for merchandise as follows: (Here follows a description of the sugar,) ‘Which merchandise I agree to store as the bank’s property as soon as landed in an acceptable public warehouse, delivering warehouse receipt, with policy covering the goods fully against fire, made out or indorsed to the order of said agent (on the understanding, however, that he is not to be chargeable with

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any expense incurred thereon), which are to be retained by him until Martin, Turner & Co.'s acceptance against said merchandise shall have been paid or satisfactorily provided for. The intention of this arrangement is to protect and preserve unimpaired the lien of the bank or its agent on said merchandise.

“(Signed)

“W. B. COOPER, JR.

“*Trustee.*”

The plaintiff subsequently caused the sugar to be entered in the custom-house, discharged from the ship and placed in a public warehouse, taking warehouse receipts in his own name as trustee and insured the sugar against loss by fire. In order to obtain possession of the sugar he was compelled to and did pay the ship's claim for the freight which amounted to the sum of \$13,546.39. This payment he made from his private means. Just prior to March 15, 1884, the agent of the defendant demanded of the plaintiff the warehouse receipts for the sugar, which the plaintiff declined to deliver until payment to him of the amount of his outlays for freight and insurance, together with the amount of a claim he made for his services in attempting to sell the sugar. Thereupon an agreement was made between the parties providing substantially that the plaintiff should give up the warehouse receipts, and that the defendant should deposit with the Central Trust Company \$23,000 to abide the judgment of the court in an action which was to be brought by the plaintiff against the corporation to enforce his claim for repayment to him of the amount he had paid for freight, etc., as above stated. On the twenty-sixth of February, and before the maturity of the bills of exchange drawn by Martin, Dyce & Co. upon Martin, Turner & Co., they both made an assignment and went into bankruptcy. The sugar did not sell for enough to pay the claims of the defendant holding the bills of exchange above-mentioned, and the freight paid by the plaintiff. This action was brought in conformity with said agreement.

It appears in the evidence that the plaintiff was a commission merchant in the city of New York, having business trans-

actions with the firm of Martin, Dyce & Co., at Manilla; that these transactions consisted in soliciting orders here for such of the products of the East Indies as were dealt in by that firm, and to be delivered by Martin, Dyce & Co., and he also acted as a commission merchant for them in the sale of goods which they sent to New York for that purpose. There were no other relations between the parties. The practice of the plaintiff had been when goods of the firm were received in New York, to sell the same and account for the proceeds. He paid the freight on the various cargoes which were received by him by advances made by himself and reimbursed himself for his payments from the proceeds of the sale of the property.

There was evidence tending to show that his advances were made, not upon the faith or credit of his consignor, but upon the security of the property which was consigned here. It also appeared that although he sometimes drew drafts upon the firm for the purpose of paying freight and other charges upon the goods coming here, yet he always himself provided for the payment of such drafts, and when they matured he paid the money. There was also evidence that in this particular case he availed himself of no moneys raised in that way, but advanced the amount directly from his own pocket.

The referee decided that the amount of the freight thus paid by him in the case in question, he was entitled to have repaid before the defendant corporation would be entitled to the property, and he gave judgment accordingly. The General Term did not reverse the referee's decision upon any question of fact, but assuming the facts to be as found by the referee, that learned court deduced a different conclusion of law, and held that the plaintiff, in advancing the money to pay the freight on the goods in question, was simply performing a duty which he owed to Martin, Dyce & Co., as their agent, and was doing for them what they would have been obliged to do themselves if they had been here, and that as the lien of the defendant corporation was the paramount one the plaintiff in paying that freight could not be substituted in their place and have himself a lien superior to that of the bank.

In this result we think the learned General Term fell into an error. It may be assumed that Mr. Cooper, acting in his capacity as commission merchant for the firm of Martin, Dyce & Co., in regard to this cargo of sugar which was to arrive per Henrietta, went to the agent of the defendant in New York for the purpose of seeing what arrangement could be made for the sale of the sugar and the payment of the proceeds to the defendant so far as its claim went. The defendant was in this position: It had advanced money upon bills of exchange and had received as collateral security for their payment the bills of lading indorsed in blank by the consignor of the sugar. This placed the title to the sugar in the corporation defendant. The sugar was in the Philippine Islands and was to be brought to New York and thence transported to Canada for ultimate consumption there. The transportation necessarily involved a large expenditure in the way of payment for freight. The carrier had the first lien on the goods to secure the payment of such freight. When the sugar arrived in New York, no matter who was the owner, or what the liens on the property were, the property itself could not be taken from the possession of the carrier until the freight thereon was paid in full. The defendant, therefore, whether as pledgee or owner, had the right to its possession only on payment of the freight. In truth, however, the only interest which the defendant had was that the property should sell for the highest amount in order the more effectually to secure it for the advances it had made upon the bills of exchange in question. When the plaintiff went to the agent of the defendant and the agreement above alluded to was made, we think that he stood in no position towards the firm of Martin, Dyce & Co., which made it his duty to advance the money necessary to the payment of the freight out of his own pocket and trust to the personal credit of Martin, Dyce & Co., for repayment. On the contrary, taking the situation as it then was and reading the receipt signed by the plaintiff and delivered to the agent of the defendant in New York, we think the transaction amounted to this: Here was a large amount of sugar coming

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to the city of New York, owned by Martin, Dyce & Co., really, but subject, first, to the lien of the carrier for freight; next to the lien of the defendant to hold it as security for the payment of the bills of exchange, and in case of failure, subject to the right of defendant to sell the same. From the evidence in the case we think the referee was fully justified in holding that it was not the duty of the plaintiff to personally advance the money to pay the freight on the property and trust to the personal credit of Martin, Dyce & Co., for repayment; that he did not in this transaction so far occupy the position of agent to Martin, Dyce & Co., as to make it incumbent on him to do what they would have been bound to do if here, namely to pay the freight, to the extent, at least, of making such payment from his own funds.

Looking at the situation as it existed at that time, we think the fair construction to be placed on the receipt is that the plaintiff was to take the property from the carrier upon its arrival and store it as the bank's property as soon as landed, and in order to do so it was known by both parties that it would be necessary to pay the carrier the freight on the property. As the defendant could not have procured the property until the payment for freight had been made, when it permitted the plaintiff to take the property and store it as the property of the bank, he was entitled to be repaid by the bank the expenses actually and necessarily incurred by him in the performance of that agreement, and those expenses included the amount he was obliged to pay in order to obtain the delivery of the property to him, thus enabling him to fulfill his agreement to store the same as the bank's property as soon as landed.

The statement in the receipt as to the intention of the arrangement, being to protect and preserve unimpaired the lien of the bank or its agents, on this merchandise, shows plainly why this arrangement was entered into, and that the arrangement is fully carried out when the lien of the bank is kept exactly in the same state that it was in when the arrangement was made, namely, the right to the possession of the property

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upon its arrival in New York upon payment of the freight to the carrier.

It is stated that the plaintiff made this payment, not at the request of the defendant or its agent, but in pursuance of his duty to his principal, Martin, Dyce & Co. What has already been said answers that statement. The very fact that the plaintiff was permitted to have the shipping documents which entitled him to the possession of the property, upon signing the receipt above-mentioned, shows that there was an implied request on the part of the defendant that he should do those things which were necessary to be done in order to enable him to carry out the agreement which he made with the bank's agent to store the goods as the property of the bank as soon as they arrived.

There being no unvarying rule of law which makes it the duty of a commission merchant to advance from his own pocket the moneys due for freight, upon property consigned to him by his principals, the plaintiff was not himself bound in his character simply as a commission agent to make such payment. There being no absolute legal rule in such a case imposing such responsibility upon a commission merchant it depends in this case upon the facts whether there was any such duty owing by the plaintiff to his principal, Martin, Dyce & Co. Upon that question the evidence, to say the least, was conflicting, and that which tended to show that there was no such agreement or custom between the parties was *amply* sufficient to support the finding of the referee that the plaintiff in paying this freight money was not acting as the agent of Martin, Dyce & Co., but paid it on the faith and strength of the property whose possession he thus acquired. We think the judgment of the General Term, modifying the judgment entered upon the report of the referee, should be reversed, and that of the referee affirmed, with costs.

All concur.

Judgment accordingly.

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117 318JACOB MILLER, Appellant, v. THE PHOENIX MUTUAL LIFE
INSURANCE COMPANY, Respondent.

In an action upon a policy of life insurance the defense was a breach of warranty. The alleged breach was that an answer in the application to a question as to the age of the insured, was untrue. It appeared that the answer was written in by a general agent of the defendant; that the insured was a German, understanding the English language very imperfectly; that when asked his age he answered that he did not know, and when assured that it was necessary to be known he repeated his former statement; that the agent made some computation or estimate and entered his conclusion in the application, and that this was not read over to the insured after the answers were written in. No fraud was alleged or found. *Held*, that an estoppel *in pais* was fairly established which precluded defendant from setting up the falsity of the answer in avoidance of the policy.

(Argued October 17, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 21, 1885, which affirmed a judgment in favor of defendant entered upon the report of a referee.

This action was brought to have a policy of life insurance, issued by defendant and which it claimed to be void, declared existing and in force.

Isaac D. Garfield for appellant. Under the circumstances, the answer as to the age of the insured was the answer of the agent, and was consequently of the Insurance Company itself. (*Am. Ins. Co. v. Mahone*, 21 Wall. 152; *Ins. Co. v. Wilkinson*, 13 id. 222; *Plant v. Catt. Ins. Co.*, 18 N. Y. 392; *Rowley v. Emp. Ins. Co.*, 36 id. 550; *W. Sav'gs B'k v. C. O. Ins. Co.*, 31 Conn. 526; *Coombs v. H. S. & Ins. Co.*, 43 Mo. 148; 2 Am. Law Cas. 917; *Flynn v. Eq. L. Ins. Co.*, 15 Hun, 521; 78 N. Y. 557, 568, 578; *Baker v. Home L. Ins. Co.*, 64 id. 648; *McArthur v. Globe L. Ins. Co.*, 14 Hun, 348; *Higgins v. Phœnix L. Ins. Co.*, 10 id. 459; *Taylor v. Mut. Ben. L. Ins. Co.*, id. 53; *Holmes v. Drew*, 16 id. 491; *Centell v. Oswego Co. F. Ins. Co.*, 16 id. 516; *Mayham v.*

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Hartford Ins. Co., 24 id. 58; 74 N. Y. 7; *Grattan v. Met. L. Ins. Co.*, 80 id. 282; Bliss on L. Ins. 109.)

D. O'Brien for respondent. The validity of the policy depended upon the truth of the statements contained in the application, and the materiality of each and every answer made by Dreher to the questions contained in the application was agreed to by the parties, and the truth of the answers was warranted by the assured and the plaintiff. (*Armour v. Trans. Ins. Co.*, 90 N. Y. 450, 455, 456; *Ripley v. Aetna F. Ins. Co.*, 30 id. 136, 162, 163; *Graham v. Fire Ins. Co.*, 87 id. 69, 74; *Dwight v. Ger. Ins. Co.*, 103 id. 341; *Foot v. Aetna Ins. Co.*, 61 id. 577; *Cushman v. U. S. Ins. Co.*, 63 id. 404; *Bartean v. Phoenix Mut. Ins. Co.*, 67 id. 595; *Claim against Eq. L. Ass. Soc.*, 67 id. 500; *Redington v. Aetna Ins. Co.*, 77 id. 564; *Ritzler v. World Ins. Co.*, 10 J. & S. 409; *Fitch v. Am. Pop. L. Ins. Co.*, 59 N. Y. 557; *Higby v. Guard. Mut. L. Ins. Co.*, 53 id. 603; Angell on Ins., § 307; *Fort v. Aetna Ins. Co.*, 61 N. Y. 571; *Smith v. Aetna Ins. Co.*, 49 id. 211; *Baker v. U. Mut. Ins. Co.*, 43 id. 283; *Nat. L. Ins. Co. v. Minch*, 53 id. 144; *Ins. Co. v. Wilkinson*, 13 Wall. 222; May on Ins., § 175.) A party signing a paper which is the basis, or in the nature of a contract, whose signature is not the result of fraud or mutual mistake, is conclusively bound thereby. His failure to read the paper or to have it read is inexcusable negligence. (*Breeze v. U. S. Tel. Co.*, 48 N. Y. 132; *Kirtland v. Dinsmore*, 62 id. 171; *Woodruff v. Shepard*, 9 Hun, 322; *Fowler v. Trull*, 1 id. 409; *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 166; *Gelger v. Dinsmore*, 51 N. Y. 166; *Baker v. Home L. Ins. Co.*, 2 Hun, 402; 64 N. Y. 648; *Dwight v. Ger. Ins. Co.*, 103 id. 347; *Higgins v. Phoenix Mut. L. Ins. Co.*, 74 id. 7; *Grattan v. Met. L. Ins. Co.*, 80 id. 292; *Taylor v. Nat. Ben. L. Ins. Co.*, 14 id. 348; *Ryan v. World Mutual Life Ins. Co.*, 41 Conn. 168; *Mowry v. Rosendale*, 74 N. Y. 360; *Cohen v. Cont. Ins. Co.*, 69 id. 300.) In order to establish a successful defense it was only necessary for the defendant to show that

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the representations contained in the application and specifically referred to in the answer were untrue. (*Swift v. Mass. L. Ins. Co.*, 63 N. Y. 186; *Dilleber v. Home L. Ins. Co.*, 69 id. 256; *Ætna L. Ins. Co. v. Rance*, 91 U. S. 510; *Foot v. Ætna Ins. Co.*, 61 N. Y. 571; *Ritzler v. World L. Ins. Co.*, 10 J. & S. 410; *Brennan v. Security L. Ins. Co.*, 4 Daly, 296; *Edington v. Ætna L. Ins. Co.*, 77 N. Y. 564.)

RUGER, Ch. J. The application for the policy in suit was signed by one Michael Dreher; was dated April 17, 1871, and contained questions to be answered by the applicant for insurance, which were therein declared to form the basis of the contract. Among others was the following: "When and where was the party whose life is to be insured born?" and it purported to be answered as follows: "At Ruttligen, Germany; year, 1807; month, October; day, thirty-first; age at nearest birthday, sixty-four." The application further stated: "It is hereby declared that the above are full and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that this application shall form the basis of the contract of insurance * * * and that any untrue or fraudulent answers, any suppression of facts * * * shall and will render the policy null and void, and forfeit all payments made thereon."

A life policy for \$10,000, payable to the plaintiff, was issued by the defendant upon this application and contained, among other provisions, the following: "This policy is issued and accepted by the assured upon the following express conditions and agreements * * * if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue * * * then and in every such case this policy shall be null and void. * * * This policy to take effect when countersigned by Johnson Miller, agent at Syracuse, N. Y." It was countersigned by Miller and delivered to the plaintiff.

The policy acknowledged the receipt of the first premium

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of \$938.50, and provided for the payment of similar premiums in every year thereafter during the life of Dreher. It was proved that the plaintiff paid the premiums for six or seven years, when he was notified by the defendant, that it would not receive any further premiums, and that it repudiated the contract upon the ground that the insured had made false representations in regard to his age, in the application for insurance. The plaintiff duly tendered the annual premiums for a year or two after this time, but the defendant refused to accept them, asserting that the contract was void. Whereupon the plaintiff commenced this action to obtain an adjudication as to whether the policy was a valid and existing contract, enforceable against the defendant, or void by reason of the alleged misrepresentation as to age.

Aside from the claim that the plaintiff had an adequate remedy at law and could not, therefore, maintain an equitable action, the sole defense set up in the answer was the allegation that Dreher's representation as to his age was false and untrue and constituted both a breach of warranty and a false representation. The referee found upon evidence, sufficient as we think to support his finding, that Dreher was, at the time of making the application, about seventy-three years old, being born in the year 1798; but he did not find that he, in fact, knew his age, or that the misrepresentations were fraudulently or intentionally made. He also found, as a conclusion of law, "That by reason of the untrue answers made by Michael Dreher to the questions in the application to the defendant for insurance, as to when he was born, and whether any application had been made to this, or any other company for assurance on his life, the policy was void and inoperative, and the defendant was authorized so to regard it."

The evidence did not show that Dreher in fact knew his age, or that any representations in regard thereto were fraudulently or intentionally made. The fact that Dreher made untrue representations in regard to previous insurance in another company was not set up in the answer, and was not, therefore, available to the defendant as a defense to this action.

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The evidence in support thereof was duly objected to by the plaintiff, and was not only of doubtful competency to prove the fact, but was inadmissible under the pleadings. So far, therefore, as the finding of law is based upon this fact it must fall since it was unwarranted by the circumstances of the case, and, therefore, the defendant must rest wholly upon the alleged misstatement of Dreher's age.

The referee seems to have assumed that the written instrument, was conclusive evidence of the agreement of the parties, and could not be subverted by parol evidence, showing the method by which Dreher's signature to the application was obtained, and the circumstances attending its execution. It is undoubtedly the general rule that a written contract signed by a party thereto and containing the terms and conditions of an agreement, is conclusive upon him, and that he will not be permitted to show, in avoidance thereof, that other stipulations were made at the time of, or before, its execution, which would vary, alter, or contradict the provisions of the written instrument. Neither is it generally a defense to an action founded upon such agreement, that the party did not read the contract, or was ignorant of its contents, or that it was prepared by the party claiming the benefit of it, unless he also shows that his signature thereto was obtained by misrepresentation or fraud.

In the case, however, of life insurance policies it is the settled doctrine of the modern cases, that where the application for insurance is drawn up by the agent of the insurer, and the answers to the interrogations contained therein, are inserted by him at his own suggestion, without fraud or collusion on the part of the assured, the insurer is estopped from controverting the truth of such statements, or the interpretation which it has given to the answers actually made by the applicant, in an action upon the instrument between the parties thereto. (*Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 id. 550; *Baker v. Home Life Ins. Co.*, 64 id. 648.) It is claimed by the plaintiff that this case comes within the rule above stated, and that the question in the case is, whether the undisputed evidence shows that Dreher did or

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did not in fact make any representations as to his age, but that the insertion of such statements in the application, was the sole act of the defendant's agent, he knowing that Dreher refused to make any statement in reference thereto.

With respect to the manner in which Dreher's signature to the application was obtained, the referee has made a peculiar but somewhat restricted finding, which, although omitting some facts established by the evidence, goes far to sustain the claim made by the plaintiff, that the method adopted by the agent in procuring the application estops the defendant from setting up the falsity of such answers, as a breach of the contract. That finding is as follows: "At the time when said application was made on the 17th day of April, 1871, Michael Dreher understood the English language when spoken, and spoke it himself to a very limited extent, and quite imperfectly. There were present on that occasion Johnson Miller, the agent of the defendant, the plaintiff, who understood and spoke both the German and English languages, and Michael Dreher. The questions contained in the application were propounded to Dreher by Johnson Miller and the answers were written by him. Questions which were not understood by Dreher were explained to him by the plaintiff in the German language. In answer to the question, 'Where and when was the party whose life is to be insured, born?' Dreher stated the place of his birth as written in the application. The agent then said, 'Mr. Dreher, how old are you?' Dreher replied that he did not know his age. The agent then said, 'Mr. Dreher, we must know your age; I cannot insure you without knowing your age; it is very important to know your age.' Dreher then gave data from which, if true, his age could be arithmetically computed. The agent Miller carefully and honestly, and, as he believed, correctly, made such computation, announced the result and entered it as it appears written in the application." This finding was duly excepted to by the plaintiff, and, in some material respects, does not appear to be supported by the evidence, and, in others, falls short of exhibiting the plain meaning and effect of the evidence produced by the plaintiff.

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No proof whatever is found in the case showing that Dreher gave any data from which, if true, his age could be arithmetically computed; neither did he in any way assent to any conclusion reached by the agent; nor is there any evidence from which the referee was authorized to find that Dreher understood the statements made to him by the agent; or that such questions as were not understood by Dreher, were explained to him by the plaintiff in the German language.

The findings, when carefully analyzed, amount only to a statement that Dreher, a foreigner substantially unacquainted with the English language, signed an application, written in that language by the defendant's agent and compiled by him from information claimed to have been acquired from Dreher by means of communications in English, in which, after Dreher had failed to give the date of his birth and had expressly stated that he did not know his age, the agent inserted the statement that he was born in the year 1807. It seems, therefore, that the referee has held Dreher accountable for the answers inserted by the agent in the application, upon the theory that because he gave some data from which the agent inferred his ability to compute the age correctly, supplementing this inference with the opinion that he computed it correctly and entered the result, as he found it, in the application, that he was, therefore, authorized by Dreher to enter the year 1807, as the date of Dreher's birth, in the application.

This conclusion seems to be based wholly upon the opinion of the witness and cannot be supported. An examination of the evidence given on the trial, however, removes all doubt as to who was responsible for the answers in question. That evidence, so far as our conclusions are based upon it, was given mainly by the agent of the defendant, and was wholly undisputed. He testifies that he solicited the plaintiff for insurance on the life of Dreher, his debtor, and persuaded him to go with him to Dreher's residence, a distance of twelve miles from Syracuse, to obtain the application for such insurance; that he took blank forms for the application with him and filled them up according to the best information he could

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get from Dreher; that Dreher was a German and understood the English language very imperfectly, and that he had to put most of the questions to him, not in the way they were written, but in a manner that he thought he could understand. He further testified that Dreher did not state to him his age, but replied to all questions relating thereto; that he did not know it. The agent expostulated with him and told him that they must know his age, but this produced no effect upon Dreher, except a repetition of the statement that he did not know his age. The witness then said that he obtained some data from Dreher, but what they were he did not recollect, and from them he computed his age and put it down. He said further; "I was in the habit in my business of estimating the ages of people by their appearance, I could guess very correctly, * * * he made no statement as to what his age was than as I have related. I did not read the application over to him after I had written it. * * * Of course there was an estimate about his age but how it was got at I could not tell, it was computed and figured from what he gave."

This witness was apparently frank and impartial in his statements, and no reason exists for claiming that he had any bias or prejudice, or for doubting the truth of his testimony. Even assuming that Dreher understood all that was said to him by the agent, and this would be a very violent assumption under the circumstances, there is not only no evidence that he gave his age, or the date of his birth to the agent; but the evidence is positive that he uniformly refused to give it. To hold under such circumstances, that he covenanted that he was born in the year 1807 and was then sixty-four years of age, would be to reverse the meaning and effect of his actual representation, and hold that a statement, for which the agent alone was responsible, was made by a party who refused to make any whatever.

The most favorable construction for the defendant that can be put upon the evidence is, that Dreher refused to make any representation as to his age, but that the agent, upon what he conceived to be sufficient grounds therefor, estimated his age

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and inserted it in the application. There does not seem to be a single fact testified to by the witness, or appearing in the case, which authorized him to fix upon the year 1807 as the date of Dreher's birth, or from which the referee could legally find that Dreher suggested any fact, which warranted the conclusion inserted by the agent in the application. The only material representation in regard to age, made on that occasion was that, clearly inferrible from the acts and conduct of the agent, and that was, that he had truly inserted in the application the information communicated to him by Dreher, and that such information would enable the plaintiff to obtain a valid policy of insurance from the defendant.

It was also in proof by uncontradicted evidence, that the defendant's agent in fact stated to the plaintiff after the application was made and before the payment of any premium on the policy that "it was all right as the old man had made no positive statement as to his age." We think, under the circumstances that an *estoppel in pais* was fairly established, and that the defendant is precluded from setting up the falsity of the statement with reference to age in avoidance of the policy. The defendant was a foreign corporation and Miller was its general agent at Syracuse, authorized to take applications and countersign and deliver policies and collect premiums from persons insuring their lives in such company. The knowledge of the agent was imputable to the company and he was held out to the public by it, as authorized to determine what constituted a compliance with the conditions of the application, the sufficiency of the answers, and the validity of the policies issued thereon, and as fully representing the company as to all matters within the apparant scope of the authority confided to him.

In this case, after having obtained from Dreher all the information that he could give, and without any supportable claim that he gave such information fraudulently or falsely, the defendant has obtained a decree that the contract of insurance was void upon the ground that Dreher's statements were untrue, when in fact to the knowledge of the defendant he

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made no material statements whatsoever on the subject of his age, either true or untrue. We do not think such a judgment can be sustained. It was said in *Dilleber v. Home Life Insurance Company* (69 N. Y. 256, 260), that "if a question is not answered there is no warranty that there is nothing to answer. And so in the case of partial answer, the warranty cannot be extended beyond the answer. Fraud may be predicated upon the suppression of the truth, but breach of warranty must be based upon the affirmation of something not true."

As we have before seen no fraud was proved or found, and the defense must rest upon the alleged breach of warranty alone. The rule applicable to such a case as the present is well settled in this state and was succinctly stated in *Mowry v. Rosendale* (74 N. Y. 363), as follows: "The principle that if the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurers without any collusion or fraud upon the part of the insured, the insurer is estopped from setting up their error or falsity as breach of warranty, seems now well settled." (*Baker v. Home Life Ins. Co.*, 64 N. Y. 648; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Ins. Co. v. Wilkinson*, 13 Wall. 222; *Ins. Co. v. Mahone*, 21 id. 152.) To these might be added *Grattan v. Metropolitan Insurance Company* (80 N. Y. 281, 295), and *Plumb v. Cattaraugus Insurance Company* (18 id., 392).

The remarks of MILLER, J., of the Supreme Court of the United States in the case of *Insurance Company v. Wilkinson* (*supra*) are so pertinent to the question involved here that a quotation at length is deemed appropriate: "In the case before us a paper is offered in evidence against the plaintiff, containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so and, in fact, had refused to make any statement on the subject."

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After stating that when an application is prepared by the party signing it and the insurance company has acted in reliance upon its truth and issued a policy, the applicant will not be allowed to question the truth of such statement, he proceeds: "If, however, we suppose the party making the insurance to have been an individual and to have been present when the application was signed and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry and that they refused to make any statement about it, and yet knowing all this wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant who procured the plaintiff's signature thereto. It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or as it is sometimes called *estoppel in pais*."

This case was followed by the same court in *Insurance Company v. Mahone* (*supra*) where testimony was admitted, under objection, to prove that the answers in an application which it was admitted was signed by the assured, were not correctly entered by the agent. The court held it competent, saying: "The testimony was admitted not to contradict the written warranty, but to show that it was not the warranty of Dillard, though signed by him, prepared as it was by the company's agent, and the answers having been made by the agent the proposals, both questions and answers, must be regarded as the act of the company which they cannot be permitted to set up as a warranty by the assured." This was held to be so, although the application and answers were subsequently read over to the assured and he then signed it. We think the evidence in this case brings it clearly within the principle laid

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down in the cases cited and that there should be a new trial of the same.

The judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

AGNES L. PRICE, Respondent, v. SAMUEL L. MULFORD,
Impleaded, etc., Appellant.

Where one receiving money in his own right is afterwards, by evidence or construction changed into a trustee, he may plead the statute of limitations as a bar in an action to recover the money.

In 1868, W., of the firm of M. & W., was county treasurer. In July of that year he transferred in the name of his firm to his successor in office an obligation or certificate of indebtedness, which had been transferred to the firm, as security for a certain court fund which had come into his hands as treasurer. In the official book containing his account of court funds was an entry under date of January 1, 1868, stating the balance on hand to the credit of said fund and that the same was invested in said certificate. At that time the firm was indebted to W. and on the books of the firm the certificate was charged to W. on account of that debt. In an action brought in 1883 to charge the firm with the amount of said certificate on the ground that the money went to its benefit, in which M. alone appeared and defended, there was no evidence of any personal participation by him in any of the transactions and no charge of fraud was made or proved against him. *Held*, that the cause of action, if any, arose in 1868, and that the statute of limitations was a bar.

Price v. Mulford (36 Hun, 247) reversed.

(Argued October 7, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 36 Hun, 247.)

This action was brought against defendants as members of the firm of Mulford & Wandell, alleged to have come to their hands belonging to plaintiff.

Mulford alone appeared and defended. The material facts are stated in the opinion.

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Samuel L. Mulford, for appellant. The cause of action set forth in the complaint was barred by the statute of limitations as against the defendant Mulford. (Code of Civ. Pro., § 396, sub. 3; *Miller v. Wood*, 41 Hun, 600; *Carr v. Thompson*, 87 N. Y. 265, 266; *Welsh v. Ger. Am. B'k.*, 73 id. 424; 1 Duer. 434; *Murray v. Coster*, 20 Johns. 576, 585; *Bible Soc. v. Hillard*, 51 Barb. 552; 41 N. Y. 619; *Smith v. Remington*, 42 N. Y. 75; *Rundle v. Allison*, 34 id. 180; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *B'k. U. S. v. Daniel*, 12 Pet. 32; *Pierson v. McCurdy*, 100 N. Y. 608.) A perfect cause of action accrued (if at all) to the plaintiff's assignors on or about January 1, 1868, when the money is alleged to have been wrongfully converted by the defendants, and no demand was necessary before commencing action. (*Kingman v. Hotelling*, 25 Wend. 423; *Parmenter v. Simonds*, 2 Bro. P. C. 43, 47; *Carroll v. Cone*, 40 Barb. 220; *Carr v. Thompson*, 87 N. Y. 165, 166; *Engel v. Fisher*, 23 N. Y. W'kly Dig. 548; *Burt v. Myers*, 37 Hun, 277; *Miller v. Wood*, 41 id. 600; *Stacy v. Graham*, 14 N. Y., 492; *Howard v. France*, 43 id. 593; *Pease v. Smith*, 61 id. 477; *Sharkey v. Mansfield*, 90 id. 227; *Powell v. Powell*, 71 id. 71; *Kern v. Schoonmaker*, 4 Ohio, 331; *Fee v. Fee*, 10 id. 400; *Northrup v. Hill*, 57 N. Y. 351; 15 Am. Rep. 501; *Argall v. Bryant*, 1 Sandf. 98; *Lathrop v. Snellbaker*, 6 O. St. 276; *Ellis v. Korlso*, 18 B. Mon. [Ky.] 296; *Leroy v. Springfield*, 81 Ill. 114; *Crawford v. Goulden*, 33 Ga. 173; *Allen v. Muller*, 17 Wend. 202; *Leonard v. Pitney*, 5 id. 30; *Ganley v. Troy City Nat. B'k.*, 98 N. Y. 495; *Burt v. Meyers*, 37 Hun, 277; *Hennsbert v. Trinity Ch.*, 24 Wend. 587; *Engel v. Fischer*, 102 N. Y. 400; *Denyo v. Schuehburgh*, 4 Y & Col. 42; *Cummings v. Brown*, 43 N. Y. 514.) This is an action at law and not at equity, and the rules governing actions at law must be applied. (*Carr v. Thompson*, 87 N. Y. 160; *Foot v. Farrington*, 41 id. 164; *Loder v. Hatfield*, 71 id. 92; *Borst v. Carey*, 15 id. 505, 510.) Where there is a legal and equitable remedy in respect to the same subject-matter the latter is under the control of the same statute bar

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as the former. (*Rundel v. Allison*, 34 N. Y. 180, 183; Code of Civil Pro., §§ 380, 382; old Code, § 91; *Carr v. Thompson*, 87 N. Y. 160; 1 Wait's Pr., 53; *Foot v. Farrington*, 41 N. Y. 164; *Mayne v. Griswold*, 3 Sand. 463; 9 N. Y. Leg. Obs. 25; *Murray v. Coster*, 20 Johns. 576; *Hickok v. Hickok*, 13 Barb. 632; *Loder v. Hatfield*, 71 N. Y. 9; *Troup v. Smith*, 20 Johns. 33, 48.) The statute runs against a trust in respect to which there is a remedy at law. (*Governor v. Woodworth*, 63 Ill. 254; *Paff v. Kinney*, 1 Bradf. 1; 7 Wait's Act. & Def. 269; *Perry v. Pierson*, 1 Gill. [Md.] 234.) It is only where there is an actual, continuing and subsisting trust that a trustee is precluded from setting up the statute of limitation. (*In Re Neilley* 19 N. Y. W'kly Dig. 85; 95 N. Y., 382; *Spotswood v. Dandridge*, 4 H. & M. [Va.] 139; *De Coucha v. Savatier*, 3 Johns. Ch. 190; *Kane v. Bloodgood*, 7 id. 90; *Burt v. Meyer*, 37 Hun, 277; *Lamner v. Stoddard*, 25 N. Y. W'kly Dig. 107; 4 N. Y. State Rep. 225; 103 N. Y. 672; 33 Conn. 67; 60 Penn. 290; 21 N. J. Eq. 76; 3 John's. Ch. 190, 216; 7 id. 90; 3 Sandf. Ch. 592; 14 Abb. [N. C.] 13; 18 Wall. 493; *Perry on Trusts*, § 865.)

Henry D. Hotchkiss for respondent. The denial of the motion to dismiss the complaint on the ground that the cause of action was barred by the statute of limitations, was proper, and should be affirmed. (Code of Civ. Pro., § 382, subd. 5; 2 R. S., 301, § 51; *Mayne v. Griswold*, 3 Sandf. 463, 481-484; *Bertine v. Varian*, 1 Edw. Ch. 343; Code, § 91, subd. 6; *Foot v. Farrington*, 41 N. Y. 164; *Carr v. Thompson*, 87 id. 160; *Kirby v. L. S., etc., R. Co.*, U. S. Sup. Ct. 30, Law ed. 569, January, 1887; *In re Price*, 67 N. Y. 231; Code of Civ. Pro., §§ 744-750; Supreme Ct. Rules, 62, 73; Laws of 1859, chap. 386.) The receiving of the money, which consistently with conscience cannot be retained, is, in equity, sufficient to raise a trust in favor of the party for whom or on whose account it was received. (*Newton v. Porter*, 5 Lana. 430; 69 N. Y. 133, 137; 2 Story's Eq. Jur., § 1255; 2 Pom.

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Eq. Jur., § 1047; *Chester v. Dickerson*, 54 N. Y. 1; *Bradner v. Strang*, 23 Hun, 445; 89 N. Y. 299; *Nat. L. Ins. Co. v. Minch*, 53 id. 144; *Hathaway v. Johnson*, 55 id. 93-96.)

DANFORTH, J. There is force in the appellant's contention that no case was made out against him, and that for want of merits the complaint should have been dismissed. This was also the opinion of the learned judge, who dissented from the judgment appealed from. It is unnecessary, however, to discuss that proposition, for whatever cause of action the plaintiff had accrued January 1, 1868. The action was not begun until November, 1883, and the view we take of the plaintiff's claim as affected by the statute of limitations, is conclusive of the case.

The record shows that one Nicholas Van Dyck Price while an infant became entitled to \$1,909.13 as his share of the proceeds of land sold under partition proceedings, in or before the year 1845. At his death in 1859, the fund was in the hands of the treasurer of Richmond county, and in June, 1883, the then treasurer, by direction of the court, delivered the same to the widow and heirs of Nicholas. Among other securities was a paper in these words:

"ROSSVILLE, *July 12, 1864.*

"This is to certify that St. Patrick's Roman Catholic Church, Richmond, Staten Island, is indebted to Mr. D. Keeley, thirteen hundred and fifty dollars for work performed on the the same.

"JOHN BARRY,

"\$1,350.00.

Pastor.

[Indorsed.]

"Please pay the within to Messrs. Mulford & Wandell, or order.

"DENIS KEELEY."

Other indorsements by Mulford & Wandell show that they received payments of interest thereon up to July 12, 1867. Then followed an indorsement made July 1, 1868, as follows:

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"Please pay within amount of \$1,350.50-100 and interest to E. P. Barton, county treasurer. (Approved, January 1, 1868.)

"MULFORD & WANDELL,

"*Per* P. S. WANDELL."

In September, 1883, the plaintiff, who was one of the heirs of Nicholas, became by assignment from the widow and the other heir sole owner of the certificate. Wandell was county treasurer from 1865 to some time in 1868, when he was succeeded by Mr. Barton, and was a member of the firm of Mulford & Wandell from June, 1862, to June, 1869. He thus filled two characters, and the evidence shows that the indorsement to Barton was made by Wandell, and the official book containing the account of court funds, when delivered to his successor contained, under the head of *Conner v. Dyke* (the partition suit), these entries:

"January 1, 1868.

"Balance on hand in this suit..... \$1,397 44

"Invested in bond of Rev. John Barry, of St.

Patrick's Church..... 1,350 00

"Interest accrued on do..... 47 25."

It also appeared that at the same time the firm of Mulford & Wandell was indebted to Wandell and the certificate was charged to Wandell on the books of the firm on account of that debt. There was no evidence of any personal participation by Mulford in any of these transactions, or knowledge of them, except as it might be imputed to him from his connection with Wandell as a partner. The action was upon the ground that the money went to the benefit of the firm, and judgment for the amount was prayed for as for so much money "had and received to and for the use of the plaintiff." At the close of the plaintiff's case the defendant Mulford asked for a dismissal of the complaint upon several grounds, and, among others, that the cause of action did not accrue at any time within six years next before the commencement of the action, and thereupon the plaintiff moved to amend the complaint by adding in the prayer for judgment, after the date,

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1868 (that being the time when the cause of action was alleged to have accrued), "that the defendant be held to have received said sum of money as trustee for the benefit of the plaintiff." The motion to amend was granted and the motion to dismiss denied. The judge presented the case to the jury and directed them to inquire "whether or not the money was applied by Mr. Wandell to the benefit of the firm," saying: "It does not make any difference in this view of the case, whether Mr. Mulford knew anything about it or not, and you will see that it is perfectly proper and right that a man who receives the benefit of funds abstracted under such circumstances as these, although he may not know anything about the source from which they are derived, should be charged with the liability to repay the persons who are entitled to the fund."

As an action for money had and received there can be no doubt that the statute of limitations was a perfect defense. It was not less a defense, although it had been received under circumstances from which the law would imply a trust. The case of an express or direct trust would be different. A trustee so appointed would be bound to take care of his *cestui que trust* so long as the relation existed, and he could do nothing adverse to it. But when one receives money in his own right, and is afterwards by evidence or construction changed into a trustee, he may insist on the same lapse of time as a bar. (*Kane v. Bloodgood*, 7 J. Ch., 88); *Lammer v. Stoddard*, 108 N. Y., 672.)

But the plaintiff cites subdivision 5, section 382 of the Code of Civil Procedure, which provides that where the "action is to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the 31st day of December, 1846, was cognizable by the Court of Chancery, the cause of action is not deemed to have accrued until the discovery by the plaintiff, or the persons under whom he claims, of the facts constituting the fraud," and insists that the general provision of the statute did not apply. But to that position there are several answers. (1.) The action is not to procure a judgment other than for a

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sum of money; the only judgment asked is for a specific sum of money, the amount of the Barry certificate with interest, and such was the verdict of the jury and the judgment. The action was founded upon an implied contract, obligation or liability, and upon nothing else. (2.) Fraud is not stated as a ground of relief, nor does the complaint contain any allegations to bring it within that subdivision. (3.) Nor was fraud of any kind, or facts from which fraud on the part of Mulford might be implied, proven against him. The fact assumed therefore by plaintiff's counsel, cannot be admitted. Mulford's character and liability as trustee, if there were any, results not from any act of his own, or of the plaintiff, or her assignors, but from the application of the doctrines of equity, which regard him as standing in that relation in order to give the plaintiff a remedy. There was a misapplication of the plaintiff's money, but it was a "misapplication," by the county treasurer, and not by the defendant; he was held liable because the firm of which he was a member received the benefit of money derived from the certificate after the other defendant made such misapplication of the trust fund. From that and not from any fraud or knowledge of fraud, or misapplication, a contract liability to make restoration was implied. Fraud was not the ground of the action, nor was it established by proof, and the limitation of six years, provided for by section 382, subdivision 1, applies. (*Carr v. Thompson*, 87 N. Y., 160.)

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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107	310
118	641
107	310
128	153
107	310
132	995

107	310
171	72

**THE NEW YORK RUBBER COMPANY, Appellant, v. JOHN
ROTHEEY et al., Respondents.**

To constitute an equitable estoppel there must have been some act or admission by the party sought to be estopped, inconsistent with a claim he now makes, and done or made with the intention of influencing the conduct of another, which he had reason to believe would, and which did, in fact have that effect. Silence will not estop unless there is not only a right, but a duty to speak.

Where, therefore, a riparian owner saw the owner on the opposite side of the stream erecting a factory upon his premises and digging a race which she knew would return the water, diverted from the stream, to it at a point below her land, *Held*, that her omission to object in any way to the proposed diversion of the water, did not constitute an estoppel barring an action to recover for such diversion.

An action is maintainable for such a diversion of the waters of a stream which materially diminishes the natural flow and, at times, takes substantially all of the water from the stream.

(Argued October 10, 1887; decided November 29, 18.7.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1885, which affirmed a judgment entered upon a verdict directed by the court.

This action was brought to recover damages for the alleged diversion of the waters of a stream.

The parties were owners of lands adjoining and on opposite sides of the stream. Upon defendant's premises was a factory run by water taken from the stream through a race from a pond above. The tail race of the mill, as claimed by plaintiff, returned the water diverted from the stream to it at a point so far down the stream that none of it flowed past plaintiff's premises.

The further facts appear in the opinion.

H. B. Turner, B. F. Lee and W. H. L. Lee for appellant. The plaintiff and its grantors, owners of lots X and Y, were entitled to have the water of the stream flow by their lots without diversion thereof by the defendants, and the General

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Term erred in holding that the defendants "acted within the scope of their rights as riparian proprietors." (Gould on Water Courses, 359, § 204; *Palmer v. Mulligan*, 3 Caines, 308; *Platt v. Johnson*, 15 Johns. 213, 218; *Merritt v. Brinkerhoff*, 17 id. 306; *Blanchard v. Baker*, 8 Greenl. R. 253, 266; *Webb v. P. Mfg. Co.*, 3 Sumn. 189, 199; *Crooker v. Bragg*, 10 Wend. 260, 264; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 400; *Clinton v. Myers*, 46 id. 511; *Arnold v. Foot*, 12 Wend. 330; *Atchison v. Peterson*, 20 Wall. 507, 511; *Haight v. Price*, 21 N. Y. 241; *Prentice v. Geiger*, 74 id. 341; *Rochedale C. Co. v. King*, 14 Q. B. 122, 134; *Wood v. Wand*, 3 Exch. 748, 772; *Embrey v. Owen*, 6 id. 353, 368; *Harrop v. Hirst*, 4 id. 43, 45; *Branch v. Doane*, 18 Conn. 233; *Monroe v. Stickney* 48 Me. 462; *Amosk. Mfg. Co. v. Doodale*, 46 N. H. 53; *Tuthill v. Scott*, 43 Vt. 525; *Graver v. Sholl*, 42 Penn. St. 58; *Hendrick v. Cook*, 4 Ga. 241.) The diversion itself is unlawful, and is to be distinguished from the right to take water from the stream. (*Elliott v. F. R. R. Co.*, 10 Cush. 191; *Dumont v. Kellogg*, 29 Mich. 420; *Wadsworth v. Tillotson*, 15 Conn. 366; *Hartzall v. Sill*, 12 Penn. St. 248; *Coalter v. Hunter*, 4 Rand. 58.) Plaintiff has parted with none of its rights as a riparian proprietor, and is not estopped from asserting its rights. (Boone's Code Pleading, § 67.) To constitute an estoppel in such a case as this, there must be something in the nature of a lack of good faith—some superior knowledge of facts concealed from one person by another whose duty it is to speak. (Bigelow on Estoppel, 484.) A party making a representation of a matter of law and not of fact, is not estopped. (*Storrs v. Baker*, 6 Johns. Ch. 166; *Tilton v. Nelson*, 27 Barb. 595; *Brewster v. Striker*, 2 Comst. 19.) Defendants having an equal opportunity of knowledge of the facts with Mrs. Smith, there was no duty cast upon her to speak. (*Giraud v. Giraud*, 58 How. 175; *Hill v. Epley*, 31 Penn. 331; *Taylor v. Ely*, 25 Conn. 250; *Viele v. Judson*, 82 N. Y. 32.) The plaintiff stands in the same position as its grantor. (*Haight v. Price*, 21 N. Y. 241, 245, 247.) Water rights

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of this nature are within the statute of frauds, and an easement in a water-course can only be created by deed or prescription. (*Babcock v. Utter*, 1 Keyes, 115; *Haight v. Price*, *supra*; Gould on Water Courses, §§ 300, 321.) The doctrine that an executed license is irrevocable is confined to those licenses under which, when executed, it cannot be claimed that any estate or interest in land passes, or to licenses given for a valuable consideration. (*Brown v. Woodworth*, 5 Barb. 550, 555; *Babcock v. Utter*, 1 Keyes, 115, 116; *Reuch v. Kerr*, 14 Serg. & R., 207; *Jameson v. Milliman*, 3 Duer, 255.) The fact that the defendants have erected expensive improvements, and that to cause the water to flow as it flows by nature will cause inconvenience and loss, is not sufficient to deprive the plaintiff of its rights. (*Corning v. Troy I. & N. Fact'y*, 40 N. Y. 191; *Viele v. Judson*, 82 id. 23, 33, 40; *T. Bkg. Co. v. Duncan*, 86 id. 221, 230; *Muller v. Pondir*, 55 id. 325, 334; *Lawrence v. Brown*, 5 id. 394, 395; *Maloney v. Horan*, 49 id. 111, 115; *Hutchins v. Hubbard*, 34 id. 24, 27; *Brant v. Virginia C. Co.*, 93 U. S. 326, 337; *Steele v. Smelting Co.*, 106 id. 448, 456.)

H. H. Hustis for respondents. A riparian owner may divert the water that flows upon or by his land for the purpose of propelling machinery upon his land, and then restoring it to the natural stream. (*Prentice v. Geiger*, 74 N. Y. 345; *Bullard v. S. Vict. Man'fg Co.*, 77 id. 531; *Garwood v. N. Y. C. & H. R. R. Co.*, 83 id. 405; *Clinton v. Meyers*, 46 id. 511.) The plaintiff is estopped from raising the question of diverting the water from the creek by the race-way. (*Corning v. Troy I. and N. Factory*, 40 N. Y. 191.) The fact that Mrs. Smith remained silent while the defendants built the race and erected extensive buildings, constitutes an estoppel. (*Town v. Needham and Harvey*, 3 Paige, 545; *Thompson v. Blanchard*, 4 N. Y. 303; *Brown v. Bowen*, 30 id. 519.) As the plaintiff bought the property with the race-way on the defendants' lands open and visible, and they saw the water in it, the defendants buildings, and the manner in which the

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water and buildings were used, they cannot complain of the diversion of water now. (*Houston v. Wheeler*, 52 N. Y. 641; *Curtiss v. Ayrault*, 46 id. 73.)

PECKHAM, J. The defendants claim two answers were made to the plaintiff's case, each of which was fatal to a recovery herein.

One answer was that the use made by the defendants of the water in the stream was not unreasonable or illegal, or in any way inconsistent with the rights of the plaintiff. The defendants say that plaintiff's lots are on the opposite side of the stream from their land, and that no machinery can be placed on the lots, to be propelled by water, as plaintiff has no land upon which to erect a dam, and there is no fall in the stream between the bridge and defendants' tail race, so that the only use the plaintiff could have for the water in the stream is for domestic purposes, and there being, as they claim, always water in the stream by the plaintiff's lots for such purposes, its rights as a riparian owner have not been injured.

The difficulty with this statement is that there is evidence in the case which tends to contradict it, and which tends to show that the use made by the defendants of the water in the creek was such that at various times the quantity which would otherwise have flowed past plaintiff's lots was perceptibly and materially diminished, and to such an extent that frequently when the water was running through the tail race of defendants there was none running over or through the dam except leakage, and of course none flowing past the plaintiff's lot, the whole substantial part of the water of the stream going through defendants' tail race instead of down its original and natural channel. There is evidence tending to show that the water was not returned to the stream in time to reach that part of the plaintiff's lot which it would otherwise naturally touch.

We do not assume to say this evidence is true. But it raised an issue which the plaintiff was entitled to have decided by the jury unless there was some other defense to the action.

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There cannot be much dispute now as to the general rights of riparian owners, or that if the defendants did use the water to such an extent as some of the evidence tends to prove, they used it in a manner that they had no legal right to do. Whether they did or not we do not know. The other answer which the defendants make is that of an equitable estoppel.

It may be assumed that at the time when the defendants built their mill-race and erected expensive buildings for manufacturing purposes, Ruth J. Smith was the owner of the lots in question, and which are now owned by the plaintiff.

The estoppel is based upon the following facts: The defendants built the mill-race upon their own lands and erected their factory also upon their own lands, which factory was to be supplied with water from the stream carried through this mill-race. While Ruth J. Smith was thus the owner of the lots and while the defendants were building this mill-race on their own lands, she saw defendants and their men at work on it and on the factory, and she understood the race was being built to take water from the stream to the shop, and during all the time it was in course of construction she never objected to it in any way or authorized any one to object to it for her, nor did she at the time object to the defendants carrying the water down the race.

These are all the facts upon which an estoppel is claimed and upon which the learned courts below decided that an estoppel existed. They are not sufficient to authorize the presumption of a grant or even a license (*Haight v. Price*, 21 N. Y. 241), and defendants must rest their defense upon an estoppel pure and simple. It will be seen there is no element of fraud in the case, nor any evidence that Mrs. Smith led the defendants into making this outlay on any assumption that they had the right to do it when in truth they had not and she knew it and yet induced them to go on and expend their moneys upon such erroneous assumption. Nothing of the sort is pretended. The simple case is presented of an owner of land standing by and seeing an owner of adjoining land make

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such use of his own land, as he had a right to without informing him that if he proceeded thereafter to do an illegal act it would not be permitted. The defendants had a right to excavate on their own land and to build such a factory as they chose, but even if they had no right to dig the mill-race and let the water in it, and thus, possibly, divert the water from the stream, the owner of the adjoining land (Mrs. Smith) was not bound to interfere or protest. She had the legal right to acquiesce in the action of the defendants, so far as to refrain from interference, and her simple knowledge that defendants were thus engaged did not require her to object under penalty of the loss of her legal rights. The cases referred to by counsel for respondents to sustain the estoppel in this instance do not go to any such length, and I have been unable to myself find any that do.

The counsel referred to *Town v. Needham* (3 Paige, 545); *Thompson v. Blanchard* (4 N. Y. 303); *Brown v. Bowen* (30 id. 519); *Corning v. Troy Iron and Nail Factory* (40 id. 191). The first case, that of *Town v. Needham*, simply enforced the well settled rule of equity that where the owner of real estate suffers another to purchase the estate from a third person, and to erect buildings thereon under the erroneous belief that he has a good title, and such owner permits the purchaser to conclude his purchase and intentionally conceals from him his title to the property, the owner will not afterwards be permitted to enforce his title against such purchaser. In *Thompson v. Blanchard* the same doctrine is held applicable to personal property. *Brown v. Bowen* holds the same principle, the same element of concealment on one side and mistake of fact on the other, being present. To the same effect is *Trenton Banking Company v. Duncan* (86 N. Y. 221). The English rule is substantially the same. (*Ramsden v. Dyson*, L. R. 1 H. L. Cas. 129.) *Corning v. Troy Iron and Nail Factory* is really an authority for the position taken by the plaintiff here, that no estoppel can be predicated upon the facts in this case.

There is no pretence that the defendants did not know their

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title and their rights quite as well as Mrs. Smith, and none that she in any way induced them to make this expenditure. She was simply passive in the matter and failed to object to the defendants doing what they did do. In this there was no element of an estoppel. To constitute it the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct. (See *Brown v. Bowen supra*, at page 541.) In cases of silence there must be not only the right but the duty to speak before a failure so to do can estop the owner. There was no such duty here. (See *Viele v. Judson*, 82 N. Y. 32.)

The judgment of the General Term and of the circuit should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

FLORENCE MCPHERSON, Respondent, v. PATRICK ROLLINS et al.,
Impleaded, etc., Appellants.

D., for the purpose of making a provision for F., a daughter, and two grandchildren, conveyed to her certain premises, she executing to him a mortgage thereon, which stated that it was given as security, among other things, for the payment to him or to the general guardian of plaintiff, one of the granddaughters of D., of the sum of \$50 annually for the benefit of plaintiff until she should arrive at the age of fifteen, and thereafter the further sum of \$100 until she should arrive at the age of twenty-one. The deed and mortgage were recorded. Thereafter D., at the request of F., and without consideration, executed a certificate of satisfaction of the mortgage which was recorded, and a memorandum was made in the margin of the record of the mortgage to the effect that it was discharged of record. Subsequently the premises were conveyed by F. for a full and valuable consideration, the grantee having no actual notice of the execution of the mortgage. In an action to foreclose the mortgage, *held*, that a valid and irrevocable trust was created thereby, and as the same

107	816
108	168
107	816
148	806
148	523

107	816
157	209

107	816
d168	500

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had in no way been renounced by the *cestui que trust*, the discharge was in contravention of the trust and was, therefore void.

Also, *held*, that the grantees were chargeable with notice that plaintiff had a beneficial interest under the mortgage, and that the satisfaction thereof was an act not in the execution of the trust and was beyond the power of the trustee.

Field v. Schieffelin (7 J. Ch., 150) distinguished

(Argued October 12, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1885, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The action was for the foreclosure of a mortgage made by one Fannie Gray, the material portions of which are hereinafter set out.

Andres Deming, Ida McPherson, an infant, and Michael and Patrick Rollins, with others, were made defendants. The Messrs. Rollins answered, claiming title as purchasers in good faith and for a valuable consideration. Ida McPherson submitted her rights to the court asking that her interest be adjudged. The issues were tried before a referee, who found that Deming, with the purpose of providing for his two daughters and their children, made a division of his real estate and conveyed the part now in question to his daughter Fannie Gray; that as part of the same transaction she executed to him a mortgage upon that part, reciting that the grant was "intended as a security for the payment of the sum of two hundred and fifty dollars annually to said Deming for and during his natural life on or before the fifteenth day of May in each year thereof, reckoning from the date of this mortgage, and for the further payment of the further sum of fifty dollars annually to said Deming, or to the general guardian of Florence McPherson (the plaintiff) on or before the fifteenth day of May in each year hereafter for the benefit of said Florence, until the said Florence shall arrive at the age of fifteen years, and thereafter the further sum annually to said Deming or guardian of one hundred

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dollars, payable on or before the fifteenth day of May in each year until the said Florence shall arrive at the age of twenty-one years, for the benefit of said Florence, and for the further payment of the further sum of fifty dollars annually to the said Deming, or to the general guardian of Ida McPherson, on or before the fifteenth day of May in each year hereafter, for the benefit of said Ida, until the said Ida shall arrive at the age of fifteen years, and thereafter the further sum annually to said Deming or guardian of one hundred dollars, payable on or before the fifteenth day of May in each year, until the said Ida shall arrive at the age of twenty-one years, for the benefit of said Ida, said Florence and Ida being the grand-daughters of said Deming, the said Florence being fourteen years of age April 1, 1873, and the said Ida eleven years of age October 10, 1872;" that the deed and mortgage were recorded in the proper clerk's office on the 21st day of July, 1873, and thereafter and until the 16th day of February, 1875, were in the custody of Mrs. Gray; that in February, 1874, Deming, at the request of Mrs. Gray, and without payment or other consideration, executed and acknowledged a certificate of satisfaction of the mortgage, and it was recorded on the 9th of February, 1874, and a memorandum noted in the margin of the record of the mortgage as "discharged on record of discharges of mortgages, page 470;" that thereafter the premises were duly conveyed by or under the authority of Mrs. Gray to the defendants for a full and valuable money consideration paid by them.

The referee found, "as a question of fact and law, that by the proceedings of the fourteenth of July above mentioned, and the delivery and execution of the deed and mortgage of that date, an irrevocable trust for the benefit of the plaintiff and her sister Ida was created and declared in the condition of the mortgage in suit; that Deming, the trustee, had no power to annul or change the condition of the trust; that the discharge of the 6th February, 1874, above referred to, was, therefore, as to said trust and the interests of the beneficiaries, unauthorized and void;" and, as a fact, "that the Rollins, defendants, prior to and at the time of their purchase as above

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stated, had no actual notice of the existence of the mortgage of Mrs. Gray to Charles Deming, as a subsisting lien or incumbrance upon the premises therein described. But did find as a question of law and fact that they then had constructive notice, or notice sufficient to put them on inquiry as to that fact which they were bound to regard; that no part of the annuity to the plaintiff or Ida had been paid," and gave judgment of foreclosure according to the prayer of the complaint.

E. A. Nash for appellants. As trustee of an express trust, Deming had the entire legal and equitable estate in the trust property. (1 R. S. 729, § 60; Perry on Trusts, §§ 225, 321, 334, 613, 814; *Bunn v. Vaughan*, 1 Abb. Ct. App. Dec. 253; *Emerson v. Bleakley*, 2 id. 27; *Mabie v. Bailey*, 95 N. Y. 206; *Boone v. Cit. Savgs. Bk.*, 84 id. 83; *Field v. Schieffelin*, 7 Johns Ch. 150; Schouler's Dom. Rel. § 239; *Wilkes v. Rodgers*, 6 Johns. 566; *In re Bostwick*, 4 Johns. Ch. 100; *Swartout v. Swartout*, 7 Barb. 354; *Far. L. & T. Co. v. Walworth*, 1 N. Y. 433.) The plaintiff is not the owner of the mortgage, and, therefore, cannot maintain this action. (*Bunn v. Vaughan*, 1 Abb Ct. App. Dec. 253; *Emerson v. Bleakley*, 2 id. 22; Hill on Trustees, 512; *Field v. Schieffelin*, 7 Johns. Ch. 150.) If a trust was not created with a legal title vested in Deming, as trustee, for the purposes of the trust, the provision of the mortgage must be regarded as an intended gift to the donees; in which case, the mortgage not having been delivered to the donees, it was utterly void. (*Young v. Young*, 80 N. Y. 422; *Trow v. Shannon*, 78 id. 446; *Martin v. Funk*, 75 id. 134.)

A. J. Abbott for respondent. The deed and mortgage, taken together, created a valid express trust in favor of the plaintiff and her sister Ida. (*Mabie v. Bailey*, 95 N. Y. 206; *Martin v. Funk*, 75 id. 134, 139; *Smith v. Lee*, 2 T. & C. 591; Perry on Trusts, §§ 38, 96, 98, 100, 106; *Willis v. Smyth*, 91 N. Y. 297; 1 Hilliard on Mortg. 531; *Wallace v. Burdell*, 95 N. Y. 13, 25; *Darling v. Rogers*, 22 Wend. 491; 3 R. S. § 55; *Young v. Young*, 80 N. Y. 438; Hill on

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Trusts, 130.) If a valid trust was created, then it was clearly an irrevocable trust. (*Mabie v. Bailey*, 95 N. Y. 206; *Martin v. Funk*, 75 id. 134; *Lee v. Smith*, 2 T. & C. 591; *Douglass v. Cruger*, 80 N. Y. 15; *Sonnerby v. Arden*, 1 Johns. Ch. 240; *Meiggs v. Meiggs*, 15 Hun, 453; *Thebaud v. Schermerhorn*, 61 How. Pr. 200; *Wallace v. Burdell*, 97 N. Y. 13, 25; *Perry on Trusts*, §§ 96, 98, 100, 104, 105, 106, 466.) The trust being expressed in the instrument creating it, any sale, conveyance or other act of the trustee in contravention of such trust would be absolutely void. (3 R. S. [5th ed.] 22, §§ 84, 128; *Cruger v. Jones*, 18 Barb. 476; *Douglass v. Cruger*, 80 N. Y. 15; *U. S. Trust Co. v. Roche*, 41 Hun, 549; *Lahens v. Dupasseur*, 56 Barb. 266; *Allen v. Dewitt*, 3 Comst. 276; *Pendleton v. Fay*, 2 Paige Ch. 201; *Perry on Trusts*, § 334; *Brewster v. Carnes*, 103 N. Y. 562.) The trust in question was a completely executed trust. (*Perry on Trusts*, § 359; *Hill on Trustees*, mar. pg. 83; *Martin v. Funk*, 75 N. Y. 134; *Leading Cas. in Eq.* [H. & W. Notes] 60, 61; *Hayes v. Kershaw*, 1 Sandf. Ch. 261; *Story's Eq. Jur.* §§ 433, 987; *Dupree v. Thompson*, 4 Barb. 280; *Van Cott v. Prentice*, 104 N. Y. 45.) An executory trust created upon a meritorious consideration is good in equity. (*Hayes v. Kershaw*, 1 Sandf. Ch. 261; *Hill on Trustees* [Am. ed.] 129, note 1.) No notice of the creation of the trust to the beneficiaries, and formal acceptance by them, was essential to the validity to the same, as against the voluntary settlor, Deming. (*Perry on Trusts*, §§ 98, 105; *Hill on Trustees*, 83 m.; *Weston v. Barker*, 12 Johns. 276; *Moses v. Morgantroyd*, 1 id. 119; *Cumberland v. Coddington*, 3 id. 261; *Martin v. Funk*, 75 N. Y. 134; *Meiggs v. Meiggs*, 15 Hun, 453; *Van Cott v. Prentice*, 104 N. Y. 56.) No valuable consideration is necessary where the settlor in the trust by clear and explicit declarations, duly executed and clearly intended at the time, to be final, makes himself a trustee. (*Van Cott v. Prentice*, 104 N. Y. 52; *Perry on Trusts*, §§ 38, 96, 100, 106; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Dygert v. Remerschnider*, 32 id. 648; *Bump on Fraud Conv.*

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582; *Babcock v. Eckler*, 24 N. Y. 623; *Cushman v. Addison*, 55 id. 628; *Phillips v. Wooster*, 36 id. 412.) The deed to Mrs. Gray and the mortgage may be considered as one instrument if necessary. (*Brumfield v. Bontall*, 24 Hun, 451.) Mr. Deming, as such trustee, had no authority to receive the payments before they became due, and the defendants are chargeable with knowledge of this fact. (*Smith v. Kidd*, 68 N. Y. 131, 141; *Geddings v. Seward*, 16 id. 265, 368; *Perry on Trusts*, §§ 466, 612, 814, 831; *Hill on Trustees*, 381 [Marg.]; *Swartout v. Swartout*, 7 Barb. 354, 367; *Walworth v. Far. L. & T. Co.*, 4 Sandf. Ch. 51; 1 N. Y. 33; *Doubleday v. Cress*, 50 id. 415; *Fellows v. Northrup*, 39 id. 121; *Smith v. Kidd*, 68 id. 141; *Story on Agency*, §§ 98, 99; 2 Pars. on Cont. 214; 2 Green on Ev., § 65; *Brewster v. Carnes*, 103 N. Y. 564; *Fellows v. Longyor*, 91 id. 329, 331; *Redf. on Wills* [3d ed.] 621, 628.) The defendants had constructive notice by the public records of the trust. (*Swift v. Smith*, 12 Otto, 442, 451; 26 U. S. S. C. R. 193, 196; *Lee v. Horton*, 104 N. Y. 541; *Youngs v. Wilson*, 27 id. 354; *Story Eq. Jur.* § 403; *Johnson v. Stagg*, 2 Johns. Ch. 524; *Parkest v. Alexander*, 1 id. 399; *Tift v. Munson*, 57 N. Y. 97; *Jones on Mortg.* 557, 559; *C. Val. B'k v. Delano*, 48 N. Y. 336; *Peck v. Mallams*, 10 id. 540; *Frost v. Beekman*, 1 Johns. Ch. 299; 18 John. 564; *Parker v. Conner*, 93 N. Y. 124; *Acer v. Westcott*, 46 id. 392.) The defendants are not protected by the attempted discharge upon the record. (3 R. S. [5th ed.], 57, § 60; *Swartout v. Swartout*, 7 Barb. 354, 367; *Viele v. Judson*, 82 N. Y. 39; *Bacon v. Vanschonhoven*, 19 Hun, 158; *Ely v. Schofield*, 35 Barb. 330; *Milburn v. Hammond*, 13 Hun, 475, 479; *Doubleday v. Kress*, 50 N. Y. 415; *Perry on Trusts*, §§ 466, 601, 814, 831; *Story on Agency*, § 146; *Hill on Trustees*, 769; *Thomas on Mort.* 152, 158; *Williamson v. Brown*, 15 N. Y. 364; *Acer v. Westcott*, 46 id. 390; *Reed v. Gannon*, 50 id. 345; *Story Eq. Jur.*, § 400; *Briggs v. Davis*, 20 N. Y. 15; *Swartout v. Curtis*, 5 id. 301; *Brewer v. Bonney*, 12 Gray, 113; 1 Willard on Mort. 335; *Washb. on Real P.* 562; *N. L. Ins. Co. v. Dake*,

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87 N. Y. 257.) As between several equities affecting the same estate, if otherwise equal, the first will govern. (2 Johns. Ch. 607.)

DANFORTH, J. That a valid trust was created by the terms of the mortgage, and to the effect as found by the referee, and that it continued to exist there can be no doubt. The transfer of property was executed and the relation of trustee and *cestui que trust* formed and at no time renounced. This question must be deemed closed in this court by its decision in *Martin v. Funk* (75 N.Y. 134). The important inquiry before the referee was, whether the defendants had any notice, actual or constructive, of the plaintiff's rights, or of the character in which Deming held the mortgage. His finding that they had no actual notice reduces our inquiry to the effect of the recording act. As intending purchasers they must be presumed to investigate the title and to examine every deed or instrument forming a part of it, especially if recorded; they must, therefore, be deemed to have known every fact so disclosed (*Acer v. Westcott*, 46 N. Y. 384), and every other fact which an inquiry suggested by those records would have led up to. Thus they are plainly chargeable with notice of the mortgage and of all the facts of which the mortgage could inform them. They knew, therefore, that the legal interest was in Deming, and that, to some extent, he was the owner of a beneficial interest. As to that they might rely upon his acts. How was it as to the plaintiff? The mortgage declared that it was intended as security for the payment of \$250 annually to Deming, individually, and \$50 annually to "Deming, or to the general guardian of Florence McPherson (the plaintiff), on or before the fifteenth day of May in each year hereafter, for the benefit of said Florence, until the said Florence shall arrive at the age of fifteen years, and thereafter the further sum annually to said Deming or guardian, of one hundred dollars, payable on or before the fifteenth day of May in each year until the said Florence shall arrive at the age of twenty-one years, for the benefit of said Florence;" and recited, also, that she was fourteen years of age on the 1st of

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April, 1873, being the same year in which the mortgage was executed. There was notice, therefore, that the plaintiff had a beneficial interest under the mortgage, which, by its terms, would continue until 1880, the time of her majority, and in like manner, although to a different period, as to the rights of Ida. It is true that at the same time the purchasers found of record a certificate signed by Deming, dated February 6, 1874, referring in terms to this mortgage and declaring that it "is redeemed, paid off, satisfied and discharged." But this was an act not in the execution of his trust nor warranted by it, and the referee properly held that, as against the plaintiff, it was of no effect. As to this, also, the purchasers must be presumed to have known the law. The case of *Field v. Schieffelin* (7 Johns. Ch. 150), and other similar cases cited by the appellants apply only where a trustee or guardian has a power of disposition of the estate and may exercise it in his discretion. This power Deming did not possess. The discharge was in contravention of the trust and, therefore, in fraud of the beneficiaries for whom the trust was created. By its very terms the mortgage was to be a security not only for the payment of the money, but to remain such security for the payment of money at specific times during the plaintiff's minority. The defendants knew this and knew also that the time when the trustee was authorized to receive payment had not arrived. His power was limited by the terms of the mortgage, and his apparent authority was his real authority. He had no power to vary its terms nor receive payment in anticipation of the times fixed by the mortgage. His declaration or certificate that he had been paid was, therefore, of no avail against the express provisions of the instrument by which his power was defined. In case of default on the part of the mortgagor in paying, the mortgagee might, as the appellants say, foreclose, for power to do so is expressly given by the mortgage, but whether the security for future payments would then be found in the decree or otherwise would depend on circumstances not pertinent to the present inquiry. A point is made that the plaintiff is not the owner of the mortgage and

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cannot maintain the action. Such question was not raised by the pleadings, nor does it appear to have been presented upon the trial, but the averments of the complaint show that the plaintiff is a real beneficiary. The form of the action is not objected to and the judgment goes no further than to give the relief to which, as a beneficiary, she is entitled.

It should, therefore, be affirmed.

All concur.

Judgment affirmed.

107	324
110	408
107	324
127	188

JOHN W. GILBERT v. HENRY S. DESHON, Appellant, MARGARET G. WESTERFIELD, Respondent, et al.

Defendant M., a married woman, executed to defendant D. a deed of her interest in certain real estate, which deed she delivered to her husband to be delivered to D. to enable him to borrow money thereon to pay taxes on certain real estate belonging to the husband, amounting to \$700. The deed was in fact delivered to D. by the husband as security for the payment of other incumbrances upon the property of the latter as well as the taxes. The amount advanced by D. for the taxes was fully reimbursed to him. *Held*, that as D. knew when he accepted the deed that it was put into the hands of the husband to be delivered, not as an absolute conveyance, but as collateral security for some liability of the husband which the wife contracted to guarantee, it was his duty to ascertain what that liability was, and he could not change the conditions imposed by the grantor, or add to them others agreed upon between him and the husband, as the latter had no apparent authority except that of special agent, and so his power was limited by the instructions of his principal.

In such case the rule that an agent having apparent ownership or authority conferred by the act of his principal, and dealing with an innocent third person, shall be deemed, as against the principal, to be the owner or to have the apparent authority, has no application.

(Argued October 12, 1887; decided November 29, 1887.)

Appeal by defendant Deshon from a judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 27, 1885, which affirmed a judgment against said appellant and in favor

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of defendant, Margaret G. Westerfield, entered upon a decision of the court on trial at Special Term.

This was an action for partition.

The property was sold, and one-third of the net proceeds, which was claimed by each of said defendants, was paid into court, subject to further order or judgment. It was found, in substance, that Margaret G. Westerfield formerly held the legal title to one-third of the premises. Deshon held a mortgage upon certain real estate owned by Mr. Westerfield, the husband of Margaret. There were unpaid taxes to the amount of \$700 upon said real estate and Mrs. Westerfield executed to Deshon a deed of her interest which she delivered to her husband to be delivered to Deshon to be used as security to raise money to pay off said taxes. It was claimed by Deshon that the deed was, in fact, delivered to him not only to raise a sufficient sum by using it as collateral security to pay the taxes, but also to pay a mortgage upon the property of Mr. Westerfield prior to that held by Deshon; the latter paid the taxes and the prior mortgage. The court found that Mr. Westerfield had no general authority to act as his wife's agent, and no authority to use the deed for any other purpose than as security for the taxes, and that Mrs. Westerfield had no knowledge of the agreement so claimed to have been made by her husband until after the commencement of the action. It was also found that Deshon, by and with the consent of Mrs. Westerfield, received and collected from her share of the rents of said property a sum equal to or exceeding the amount to secure which the deed was executed and delivered by her, and thereupon the trial court found and adjudged that Mrs. Westerfield was entitled to the fund in question.

Nathaniel C. Moak for appellant. Whatever may be the actual intent of a party to a transaction, if he so acts as to lead a reasonable person to believe that he understands and assents to its terms, and the other party so believing acts accordingly, the former is estopped from asserting that he did

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not so understand and assent; and he is bound by the action taken. (*Peake v. Thomas*, 39 Mich. 584.) An assignee from an agent of the owner takes, as against the owner, when the agent is vested with apparent control, and the assignee is a *bona fide* purchaser for value without notice. (*Hazewell v. Coursen*, 45 N. Y. Super. Ct. 22; *McNeil v. Tenth Nat. B'k*, 46 N. Y. 325; *Gilbert v. Groff*, 28 Hun, 50, 51; *Bodine v. Killeen*, 53 N. Y. 93; *Lavassar v. Washburn*, 50 Wis. 200; *Frank v. Lillienfeld*, 33 Gratt. 377; *Spaulding v. Drew*, 55 Vt. 253, 256, 258; 2 Herman on Estop. [ed. 1886] § 1110; *Simpson v. B'k of Com.*, 26 N. Y. W. Dig. 9; *Com. B'k v. Kortright*, 22 Wend. 348; *Moore v. Met. Nat. B'k*, 55 N. Y. 41; *Simpson v. Delhoyo*, 94 id. 189; 44 id. 371; 4 Abb. App. Dec. 253; 9 Paige, 315, 318; 1 Johns. Ch., 212; 13 Mass. 105; *Combes v. Chandler*, 33 O. St. 178; *Winter v. Belmont*, 53 Cal. 428; *Burton's App.* 93 Penn. St., 214; *Walker v. Detroit*, 47 Mich. 338; *Clarke v. Roberts*, 25 Hun, 86.) As Deshon having taken the deed to secure the indebtedness to himself, and pursuant to the terms under which he took it, expended large sums of money it was valid. (*McLaren v. Percival*, 102 N. Y. 675; 5 East. R. 83; 19 N. Y. W. Dig. 171.) It is no answer to the position that Mrs. Westerfield did not intend her husband should make the arrangement he did, or even that he deceived her so long as Deshon had no part in such deception. (*Peake v. Thomas*, 39 Mich. 584; *Western, etc. v. Clinton*, 66 N. Y. 326; *Wheaton v. Fay*, 62 id. 275; *Howe M. Co. v. Farrington*, 82 id. 121, 126, 128; 16 Hun, 591; *Coleman v. Bean*, 1 Abb. App. Dec. 394; *Quinn v. Hard*, 43 Vt. 375; *Wendisch v. Klaus*, 46 Conn. 433; *Laidlaw v. Slayback*, 23 N. Y. W. Dig. 259; 38 Hun, 644.) The law casts no duty upon a purchaser to ascertain if the trusted executor of a decedent's will is managing the estate in fraud of creditors or legatees. (Wood's App. 92 Penn. St., 379.) The alleged trust was invalid and could not be proved by oral testimony. (2 R. S. 134 [Edm. ed.] 139, § 6; *Sturtevant v. Sturtevant*, 20 N. Y. 39; *Cook v. Barr*, 44 id. 156; *Hurst v. Harper*, 14 Hun,

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280; 1 Greenl. on Ev., § 268; *Leman v. Whitely*, 4 Russ. 423.) To borrow moneys on credit of the lands conveyed to Deshon was clearly not one of the trusts authorized by law. (*Dillaye v. Greenough*, 45 N. Y. 444; *Wheeler v. Reynolds*, 66 id. 238, 234, 236; *Cook v. Eaton*, 16 Barb. 139; *Taylor v. Baldwin*, 10 id. 582.)

William H. Secor for respondent. The deed in question having been furnished by respondent and received by appellant for a limited use, and as a security only, will be held to be an equitable mortgage to that extent, and the statute abolishing resulting trusts does not apply. (*Carr v. Carr*, 52 N. Y. 251.)

FINCH, J. We are unable to see that upon the facts of this case as settled by the findings of the trial court there is any room for the application of the doctrine invoked in behalf of the appellant. That an agent dealing with innocent third persons, having an apparent ownership or authority conferred by the act of the principal, shall be deemed to be owner or possess the requisite authority as against the principal in behalf of such third persons, whatever the truth may be, is a settled and just rule, but does not apply to the case at bar. Mrs. Westfield did not confer upon her husband the *indicia* of ownership. The title to her land never went to him or passed through him. On the contrary her deed, in his possession, showed that she was conveying to Deshon herself upon some contract between grantor and grantee. Her husband in possession of a deed running to Deshon stood, both in appearance and in fact, as her agent to deliver it upon her terms and in accordance with her directions, for he knew that some terms and conditions were imposed by the grantor to qualify the delivery. He knew that the deed was not to be delivered and that the agent was not authorized to deliver it as the absolute conveyance which it appeared to be on its face, but only as collateral security for some liability of the husband which the wife contracted to guarantee. What that liability was it was the duty of the grantee to ascertain. The grantor had given to the

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husband no authority to agree as to what it should be, and by no act or representation had held him out as possessing any such authority. The husband was not her general agent and Deshon was dealing with a special agent whose authority he perfectly understood was not measured by the terms of the deed, but by the agreement of the grantor pursuant to which the delivery was to be made. He knew that the deed was not what it seemed but was to be given and accepted as an equitable mortgage. The conditions of that mortgage upon which it had been executed and entrusted to the husband for delivery the grantee was bound to correctly ascertain and could not substitute for them different conditions agreed upon by the husband alone. The wife's act did not import such an authority, and the grantee accepting the deed from the husband could not change the conditions upon which it was entrusted to him for delivery or safely assume that he was authorized to determine what they should be. The facts found show that the grantor executed and delivered the deed as an equitable mortgage to secure the payment of \$700 of taxes on her husband's lands. They further show that she fully reimbursed that sum to Deshon by a transfer of her rents which he collected to that amount, and so, the condition of the mortgage having been fulfilled, Deshon had left neither title to nor lien upon the property the proceeds of which have been ordered to be paid over to Mrs. Westerfield.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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WILLIAM H. ENSIGN et al., Appellants, v. MILLS W. BARSE
et al., Respondents.

The act of 1882 entitled "an act to amend chapter 229 of the Laws of 1879, entitled 'an act in reference to the collection of taxes in the counties of Chautauqua and Cattaraugus,' and the act amendatory thereof and supplemental thereto" (Chap. 287, Laws of 1882) is not violative of the provision of the state Constitution (art. 8, § 16) which declares no private or local act shall embrace more than one subject and that shall be stated in the title; the subject stated embraces the entire system of collection, including the sale of lands to enforce collection, the conveyances and their force as evidence and muniments of title.

Said act of 1882 is not repugnant to the provision of said constitution (art. 1, § 6), or of the federal Constitution declaring that no person shall be deprived of life, liberty or property without due process of law.

Howard v. Moot (64 N. Y. 262) distinguished.

The provision of said act (§ 2) declaring that whenever a period of fifteen years shall have elapsed after a conveyance, on a tax sale, of the lands of a non-resident lying in said counties, and the former owner or claimant shall not have entered into possession within that period, the conveyance shall be conclusive evidence that the sale and the proceedings prior thereto were regular, etc., was not intended to and does not cure jurisdictional defects of such a nature as that the legislature could not have dispensed with the statutory requirement, a failure to comply with which constitutes the defects.

The act only raises a conclusive presumption of regularity, leaving the questions of the assessors' jurisdiction and authority unaffected, in points which may not be dispensed with by legislative action.

A defect may be in one sense jurisdictional, as regards the authority of assessors acting under an existing law, and yet not so as it respects the power of the legislature to pass a statute curing the defect.

An omission of the dollar mark in the statement in a tax roll and warrant of the amount of a tax is not a jurisdictional defect.

Where an assessment-roll, made out in 1849, was not signed by the assessors as required by the provisions of the statute then in force (1 R. S., 393, § 26), but the certificate, which was written upon the roll itself and which referred to it as the "above assessment-roll" and as having been the work of the assessors, was signed. *Held*, that the defect was not jurisdictional, and so, not beyond the reach of the act of 1882.

It seems that if the certificate had been written on a separate piece of paper and attached to the roll, the conclusion would have been the same.

Shattuck v. Bascom (105 N. Y. 39) distinguished.

107	829
123	80
123	490
107	829
127	79

107	829
128	338

107	829
131	33

107	829
130	130

107	829
145	457

107	829
159	488

107	829
d162	877
162	378

107	829
164	264

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In that part of the certificate which related to the mode of valuation the words "solvent creditor" were written instead of "solvent debtor" *Held*, that this was not a jurisdictional defect.

The assessment was for a county and highway tax, no number of the road district or date of the commissioners' warrant was given. *Held*, it was not requisite that these details should appear on the assessment-roll.

The sale was in 1852. The county treasurer's notice of sale was not delivered to the printers for publication on or before the first day of September as required by the act of 1850 (Chap. 298, Laws of 1850.) The day of sale was the first Tuesday in December; the notice was dated September fifteenth; it was published once in each week for the prescribed ten weeks. *Held*, that the defect was not jurisdictional.

The provision of the act of 1835 (§ 6, Chap. 145, Laws of 1835), which provides that "the real property of non-resident owners improved or occupied by a servant or agent, shall be subject to assessment of highway labor and at the same rate as resident owners," was not intended to take the place of the provisions of the Revised Statutes (1 R. S., 505, § 19 *et seq.*), in reference to the assessment of non-resident lands for highway labor, but simply to provide that lands of a non-resident occupied or improved by him, his agent or servant, should be assessed the same as resident lands, leaving non-resident lands not so occupied or improved to be assessed as provided by the former statute.

The provision of said act of 1850 (Chap. 298, Laws of 1850), repealing certain portions of the Revised Statutes, but declaring that such repeal should not affect "any tax levied or assessed prior to the year 1849, nor any proceeding for the collection thereof," did not have the effect to exclude from collection, by sale of the land, a tax assessed in 1849 upon non-resident land and returned to the comptroller prior to the passage of said act. The act simply changed the future and prospective course of proceeding for the collection of such a tax.

A sale in conformity with the provisions of the new act was accordingly *held* valid.

Whitney v. Thomas (28 N. Y. 281) distinguished.

(Argued October 17, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 7, 1885, which affirmed a judgment in favor of defendants entered upon a verdict directed by the court.

This was an action of ejectment to recover possession of certain lands situate in Cattaraugus county.

The material facts are stated in the opinion

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William F. Cogswell for appellants. The deed was void for the reason that notice to redeem the premises from such tax sale was not published in accordance with the terms of the statute. (R. S., chap. 13, part 1, art. 3, tit. 3, § 76, p. 411; *Westbrook v. Wiley*, 47 N. Y. 457.) The statute of 1850 was purely prospective, and had no application to lands returned to the comptroller prior to April 10, 1850. (*Whitney v. Thomas*, 23 N. Y. 281, 284; 1 R. S. Chap. 13, tit. 3, art. 2, part 1, p. 402.) The premises in question were not in 1849 liable to highway tax. (Laws of 1832, Chap. 107, p. 170; Laws of 1835, Chap. 145, p. 163; *Heckman v. Pinckney*, 81 N. Y. 211.) The sale by the county judge and treasurer being for the whole tax, of which a part was void, the whole sale is void. (*People v. Hagadorn*, 104 N. Y. 516; *Shattuck v. Bascom*, 105 id. 39, 40; Blackwell on Tax Titles, 161, n. 1; *Riverside Co. v. Howell*, 113 Ill. 250.) The void highway tax, although very small, was sufficient to vitiate the whole tax. (*House v. Merriam*, 2 Greenl. 375; *Wells v. Burbank*, 17 N. H. 393; *Kimball v. Ballard*, 19 Wis. 601; *Warner v. Outagamie Co.*, 19 id. 611; Blackwell on Tax Titles, 162.)

E. D. Northrup for appellants. The sale was void for the reason that four separate years were blended in one sale. (*Thatcher v. Powell*, 6 Wheat. [U. S.] 119; *Nat. Ins. Co. v. McKay*, 5 Abb. [N. S.], 445; *Beekman v. Bigman*, 1 Seld. 366; *Westbrook v. Wiley*, 47 N. Y. 461; *Becker v. Holdridge*, 47 How. 429; *Merritt v. Village of Port Chester*, 71 N. Y. 309; *Hassan v. City of Rochester*, 67 Id. 528; *Register v. Bryan*, 2 Hawks, 17; *Culver v. Hayden*, 1 Vt. 359; *McDonald v. Gravier*, 9 La. 546; *Sharp v. Johnson*, 4 Hill, 99; *Atkins v. Kinnan*, 20 Wend. 241, 249; *Newell v. Wheeler*, 48 N. Y. 490; *Sherwood v. Reade*, 7 Hill, 434; *Powell v. Tuttle*, 3 N. Y. 405.) The sale was void for the reason that the comptroller failed to publish his notice of redemption in all the public newspapers of this state as required by 1 R. S. [2d ed.], § 76. (*Bunner v. Eastman*, 50 Barb. 640; *Westbrook v. Wiley*, 47 N. Y. 457, 460; *In re*

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Douglass, 46 id. 42; *Doughty v. Hope*, 1 id. 79; *Thompson v. Burhans*, 61 id. 66; *Varick v. Tallmann*, 2 Barb. 113; *Bussy v. Leavitt*, 12 Me. 378.) The taxes were void for the reason that neither the valuations of the property nor the taxes themselves, were expressed in dollars and cents as required by the statute. (1 R. S. [3d ed.], 444, § 9, subds. 3, 4, p. 448, § 33; *In re Church of the Holy Sepulchre*, 61 How. R. 315; *Reese v. Boese*, 92 N. Y. 632; 18 N. Y. W. Dig. 285; *Dike v. Lewis*, 4 Den. 237; 1 R. S. [3d ed.], 445, § 12; id. 348 § 33; *People v. Chapin*, 23 N. Y. W. Dig. 48; *Cook v. Norton*, 43 Ill. 391.) Also for the reason that that the assessment-roll itself was not signed by the assessors, as the statute then required. (1 R. S. [3d ed.], 447, § 26; *Mygatt v. Washburn*, 15 N. Y. 316; *People v. Supervisors*, 11 id. 563; *Hinckley v. Cooper*, 7 Hun, 371; *Clark v. Norton*, 49 N. Y. 246, 248; *Doughty v. Hope*, 3 Den. 594; *Moore v. Mayor, etc.*, 73 N. Y. 238; *Marsh v. Brooklyn*, 59 id. 280; *Sharp v. Spicer*, 4 Hill, 76, 92; *Com'rs, etc., v. Vanderbilt*, 31 N. Y. 265; *Jackson v. De Lancey*, 13 Johns. 539; *Mason v. White*, 11 Barb. 187; *Jackson v. Striker*, 1 Johns. 97; *Jackson v. Roosevelt*, 13 id. 97; *O'Donnell v. Lindsey*, 39 Super. Ct., 537; *Merritt v. Port Chester*, 71 N. Y. 314; *Cruger v. Dougherty*, 43 id. 107; *Bloom v. Burdick*, 1 Hill, 130, 141; *Striker v. Kelly*, 7 id. 25; 1 Edmond's Statutes at Large, 63; *Coffin v. Coffin*, 23 N. Y. 9; *Hoysradt v. Kingman*, 22 id. 372; *Bush v. Davison*, 16 Wend. 554; *Marsh v. Supervisors*, 42 Wis. 502; *Lewis v. Lewis*, 11 N. Y. 220, 223; *People v. Suffern*, 68 id. 321; *Bissell v. Township Spr. Valley*, 29 A. L. J., 154; *Demelt v. Leonard*, 19 How. 192; *Yorks v. Peck*, 17 id. 192; *Brown v. Cook*, 2 id. 40; *Nichols v. Fash*, 59 Barb. 283; *Hickox v. Tallman*, 38 id. 608; *Greene v. Lunt*, 58 Me. 518; *In re Com'rs Amsterdam*, 96 N. Y. 351; *People v. Forest*, id. 544; *Mushlitt v. Silverman*, 50 id. 360; *Jackson v. Estey*, 7 Wend. 151; *O'Donnell v. McIntyre*, 22 N. Y. W. Dig. 440; *Thatcher v. Powell*, 6 Wheat. 119; *Nat. B'k Chemung v. Elmira*, 53 N. Y. 49; *Jewell v. Van Steenburgh*, 58 id. 90, 91; *Atkins v. Kinnan*, 20 Wend. 449;

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Davison v. Gill, 1 East, 64; *Bellinger v. Gray*, 51 N. Y. 610; Code Civil Pro. § 934; *Clark v. Crane*, 5 Mich. 154, 155.) In the case at bar the certificate of the assessors to said assessment-roll of 1849 is defective, for the reason that the statute (1 R. S. [3d ed.], 447, § 26), is evaded and the words "solvent creditor" substituted for the words "solvent debtor," in respect to the appraisal of the real estate. (*People v. Weaver*, 67 How. 477; *People v. Fowler*, 55 N. Y. 252; *Wheeler v. Mills*, 40 Barb. 644; *Van Rensselaer v. Whitbeck*, 3 Seld. 517; *Westfall v. Preston*, 49 N. Y. 342; *Barto v. Cooper*, 22 Hun, 253; *N. B'k Chemung v. Elmira*, 6 Lans. 116; *Whitney v. Thomas*, 23 N. Y. 284; *Beach v. Hayes*, 58 How. 17; *Bellinger v. Gray*, 51 N. Y. 610.) Also for the reason that the said assessors' certificate attached to said assessment-roll is dated August 4, 1849. (1 R. S. [3d ed.], 447, § 26; *People v. McCreery*, 34 Cal. 432; *Hickox v. Tallman*, 38 Barb. 612; *Mygatt v. Washburn*, 15 N. Y. 318; *Culver v. Hayden*, 1 Vt. 359; *Sharp v. Johnson*, 4 Hill, 99; *Cowen v. Kinnan*, 20 Wend. 249; *McDonough v. Gravier*, 9 La. 546; *Register v. Bryan*, 2 Hawks, 17.) The highway tax in said assessment-roll is wholly void. No number of road district or date of commissioner's warrant is given, or anything to show jurisdiction to levy the tax. (Blackwell on Tax Titles, 160, 161; *Heyden v. Foster*, 12 Pick. 402; *In re Willis*, 30 Hun. 610; *Hall v. Shaw*, 1 Me. 339; *Johnson v. Elwood*, 53 N. Y. 436; 1 Whart. Ev., § 639; 18 Week. Dig. 285; *Hartwell v. Root*, 19 Johns. 344; *Wing v. Hall*, 47 Vt. 182; *Stevens v. Palmer*, 10 Bosw. 60; *Bunkendorf v. Taylor's Lessee*, 4 Pet. 349.) The treasurer's notice of the tax sales of 1852 being dated September 15, 1852, its date is *prima facie* evidence that it was executed on that day, and it was not sufficient. (Laws of 1850, chap. 298, §§ 47, 48; *Parker v. Overman*, 18 How. [U. S.], 143; *Hardmann v. Bowen*, 39 N. Y. 199; *Clark v. Crane*, 5 Mich. 154; Blackw. on Tax Titles, 268.) No presumptions created by statute can override it. (*Newell v. Wheeler*, 48 N. Y. 491; *Robinson v. Wheeler*, 25 id. 260; *Jarvis v. Silliman*, 21 Wis. 599; Abb. Trial Ev. 704; *O'Gara v. Eisenlohr*, 38 N. Y. 296;

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People v. Snyder, 41 id. 397.) Chapter 298, Laws of 1850, repealed all existing statutes relating to sales of lands for arrears of taxes, and established an entirely new and independent system therefor, and said chapter was wholly prospective in its provisions. (*Whitney v. Thomas*, 23 N. Y. 284; *Mayor, etc., v. Buell*, 19 N. Y. Week. Dig. 446.) Chapter 229, Laws of 1879, page 304, entitled "An act in reference to the collection of taxes in the counties of Chautauqua and Cattaraugus," is, so far as relates to the last sentence of the thirty-second section thereof, unconstitutional. (*People v. Hill*, 35 N. Y. 451; *In re Sackett, Douglass and De Gravo Sts.*, 74 id. 103; *In re Van Antwerp*, 56 id. 201; *People v. Briggs*, 52 id. 553; *In re Com'rs, etc.*, 74 id. 95; *People v. O'Brien*, 38 id. 199; *People v. McCann*, 16 id. 58; *Williams v. People*, 24 id. 407; *Huber v. People*, 49 id. 134; *Watertown v. Fairbank*, 65 id. 583.) Notwithstanding the statute affects to make the tax-deed conclusive evidence, yet defects in the proceedings may be proved under the ordinary rules of evidence, and the alleged tax titles defeated. (*Stewart v. Chrysler*, 22 Week. Dig. 441; *Kent's Com.* 408, 423; *Dash v. Van Kleeck*, 7 Johns. 447; *Vance v. Vance*, 28 Alb. L. Jour. 66; *Hickox v. Tallman*, 38 Barb. 612; 30 Hun, 121; *Jackson v. Morse*, 18 Johns. 441; *White v. Hart*, 13 Wall. 653; *Osborn v. Nicholson*, 13 id. 646; *Taylor v. Porter*, 4 Hill, 140; *Wynehamer v. People*, 13 N. Y. 394; *Wilkinson v. Leland*, 2 Pet. 658; *Atkins v. Dunlap*, 50 Me. 111; *Coffin v. Rich*, 45 id. 507; *Read v. Frankfort*, 23 id. 318; *Proprietors Ken Pur. v. Laboree*, 2 id. 275.)

John G. Hall and *D. H. Bolles* for respondents. It is to be presumed that the county treasurer published the notice of redemption as required by the statute. (*Colman v. Shattuck*, 62 N. Y. 348, 358.) The use in the certificate of the word "creditor" in place of the word "debtor" was a mere clerical error, which misled no one and does not indicate that the assessors adopted an unsound basis of assessment. (*McIntyre v. Sanford*, 9 Daly, 21.) The objection to the roll, based upon the fact that no denomination is given in the copy of

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the assessment-roll produced, to the figures representing the valuation, and likewise to the figures representing the tax is unimportant. (*Am. T. Co. v. Smith*, 32 Hun, 121; 96 N. Y. 670; *Chamberlain v. Taylor*, 36 id. 24.) The statute did not require that the roll should specify the road district in which the labor had been assessed nor the number of days labor. (1 R. S., chap. 16, pt. 1, art. 3, tit. 1, §§ 47, 50, 51.) As to the time of preparation and delivery of the notice, the statute was merely directory. (*People v. Allen*, 6 Wend. 486; *Bradley v. Ward*, 58 N. Y. 401; *People v. Assessors of Wilson and Somerset*, 10 N. E. Rep. 871.) All the non-resident lands in a town are subject to highway labor. (Bacon's Ab. "Statute D;" *Harrington v. Trustees*, 10 Wend. 547; *Bowen v. Lease*, 5 Hill, 225.) The act of 1850, subjects to its course of procedure, all non-resident lands which had been theretofore regularly returned to the comptroller. (*Smith v. People*, 47 N. Y. 330.) The occasion that called for the passage of the law and the object sought by its enactment are properly to be considered in determining its construction. (*Sturgis v. Hall*, 48 Vt. 302; *People v. Sup'rs*, 70 N. Y. 228; *Smith v. Newell*, 32 Hun, 501; *Nash v. White's B'k*, 37 id. 57; *Hartung v. People*, 22 N. Y. 108; *Southwick v. Southwick*, 49 id. 517; *Denman v. McGuire*, 101 id. 161; *Capron v. Strout*, 11 Nev. 304; *Randolph v. Larned*, 27 N. J. Eq. 557; *State v. Vernon Co.*, 53 Mo. 128; *Grey v. Mobile Tr. Co.*, 55 Ala. 387.) When an act amending a former act re-enacts provisions of the former, the latter act will be taken as a mere continuation of those provisions of the former, and all proceedings had in pursuance of these provisions, while the former act was in force, remain valid and effectual. (*State v. Wish*, 15 Neb. 448; *Scheftels v. Tabert*, 46 Wis. 439; *State v. Baldwin*, 45 Conn. 134; *Dashill v. Mayor, etc.*, 45 Md. 615; *Ballin v. Ferst*, 55 Ga. 546; *Middletown v. N. J. R. R. Co.* 26 N. J. Eq. 269; *State v. Vernon Co.*, 53 Mo. 128; *Lands v. Chic. R. Co.*, 33 Wis. 640; *Belvidere v. Warren R. Co.*, 34 N. J. L. 193; *Pac. Tel. Co. v. Comm.*, 66 Penn. St. 70; *Pac. M. Co. v. Goliffe*, 2 Wall. 450; *Smith v. People*, 47 N. Y. 330.)

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FINCH, J. If the tax title of the defendants is good, any discussion of the plaintiffs' title and the alleged defect breaking its chain, will prove to be needless; and it is best, therefore, to inquire whether, conceding the sufficiency of the plaintiffs' title taken by itself, it has been destroyed and rendered unavailing by the paramount title of the defendants derived through a sale of the land for taxes. Two such sales occurred; one by the comptroller in 1843, and one by the treasurer of Cattaraugus county in 1852. Various defects in the proceedings are disclosed, which the appellants claim invalidated the resulting conveyances and to the effect of which a large portion of the argument was directed.

So far as these defects were not jurisdictional and amounted only to irregularities, they were cured by the act of 1882 (Chap. 287), which provided that where fifteen years had elapsed after a conveyance by the comptroller or county treasurer of lands in Chautauqua or Cattaraugus county belonging to non-resident owners, and such owners had not entered into actual possession of the same and made permanent improvements thereon, the deed or conveyance should be "conclusive" evidence that "the sale and all proceedings prior thereto, from and including the assessment of the land and all notices heretofore or hereafter required by law to be given, previous to the expiration of the time allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of all laws requiring and directing the same or in any manner relating thereto."

Before considering the scope and range of this enactment, relatively to the defects in the tax sales, it is necessary to dispose of an attack upon the statute itself as being in conflict with the Constitution. Its title is "An act to amend chapter 229 of the Laws of 1879, entitled 'An act in reference to the collection of taxes in the counties of Chautauqua and Cattaraugus and the acts amendatory thereof and supplementary thereto.'" It amends section 32 of the act of 1879. It makes the deeds of the comptroller and county judge and treasurer presumptive evidence of regularity in all cases, and

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conclusive evidence of regularity in some. The criticism suggested is that more than one subject is embraced in the bill, and so it violates section 16 of article 3 of the Constitution. We are not of that opinion. The one subject of the bill is the collection of taxes in the two counties named. That fairly covers the entire system of collection. The sale of the lands enforces the collection; the deeds give effect and vitality to the sale, and their force as evidence and as muniments of title is a natural and essential element of the system. In *Supervisors v. Allen* (99 N. Y. 532, 538), a similar objection was considered. The title was in the form of that under discussion and it was claimed that provisions authorizing the supervisors to designate the banks in which the treasurers should deposit the state moneys and directing such banks to pay interest and give bonds, introduced a new subject and one not covered by the title. We held the contrary, deciding that the provisions were connected with the subject designated in the title. That adopted in the statute before us is not deceptive or misleading. The enactment contains nothing which one reading the title might not reasonably and naturally expect to find in the statute as within its scope. That title gave notice that an amendment of the laws in force in the two counties for the collection of taxes was proposed, and no reader of or listener to that title, could fairly complain of deception at whatever point of the general system or its details an amendment was introduced bearing upon the manner or efficacy of the system of tax collection. (*Matter of application of Paul*, 94 N. Y. 497, 505.) The act did not violate the fundamental law in the respect under consideration.

But it is further assailed as retrospective in its operation and in violation of section 6 of article 1 of the Constitution which provides that no person shall be deprived of life, liberty or property without due process of law. The counsel on both sides agree as to the legitimate range of a curative statute. They agree that a retrospective statute curing defects in a legal proceeding where they are in their nature irregularities only and do not extend to matters of jurisdiction, is

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not void on constitutional grounds; that if the thing wanting or omitted, which constitutes the defect is something, the necessity for which the legislature might have dispensed with by prior statutes, or if something has been done or done in a particular way which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute. We see no reason to disagree with the counsel in this general statement of the law, at least for present purposes, though it may not be above criticism or beyond exception. The act of 1882 does not on its face purport to cure jurisdictional defects. It raises a conclusive presumption of regularity, but leaves the question of the assessors' jurisdiction and authority unaffected. Thus understood, it comes within the rule which counsel concede to be correct. It does not make the tax deed conclusive evidence of a complete title, but leaves open to the owner full right to assail the proceedings in any jurisdictional respect.

We should, therefore, disregard such defects in the proceedings as are not jurisdictional, but founded upon acts or omissions wholly within the power of the legislature to have dispensed with or treated as immaterial, and in so doing it will be found, I think, that only the two defects pointed out and relied upon by the senior counsel of the appellants are open to discussion. Confining our attention to the tax title of 1852 we are required to consider the following alleged defects. That sale was made for the county and highway tax of 1849 and it is objected that the amount of the tax is not expressed in dollars and cents. This objection is founded upon the absence of the dollar mark. In *American Tool Company v. Smith* (14 Abb. [N. C.] 378), the same difficulty appeared on the face of the assessment-roll and was held not to invalidate the assessment. That case was affirmed in this court. (96 N. Y. 670.)

The second objection made is, that the assessors did not sign the roll. The statute required that the assessors should sign the assessment-roll and attach a specified certificate which should also be signed by them. (1 R. S., part 1, chap. 13, title 2, art. 2, § 26.) In the present case the certificate was

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signed but the roll not. That certificate referred to and identified the roll to which it was attached. It spoke of it as the "above assessment-roll," and as having been the work of the assessors. Passing by all consideration of what might have been the consequence of this omission if no healing act had been passed, it is quite evident that the legislature might have dispensed with the signatures of the assessors to the roll as such and been content with their signature to the certificate appended as a sufficient identification of the official act. In the present case the certificate was written upon the roll itself and not merely annexed to it, and it would have been entirely within the legislative power to have made the one signature to the certificate alone necessary. The defect, therefore, was not so jurisdictional as to be beyond the reach of the act of 1882.

We take the same view of the third defect enumerated. The form of the certificate is prescribed and in that part of it which relates to the mode of valuation the words "solvent creditor" appear instead of "solvent debtor." The question is not as to the effect of this error upon the tax while standing unexcused, but of the power of the legislature by a subsequent and healing statute to make it immaterial and leave it harmless. The provision is important and useful, but the legislature might have dispensed with it entirely without affecting the validity of the tax, or required it to follow the very phraseology here adopted.

The same answer awaits the fourth objection, which is founded upon the date of the assessors' certificate indicating that it was made August 4, 1849. We are not quite sure that we understand correctly the appellants' brief upon this point. They seem to concede that, as the law then stood, though it is different now, the roll could legally have been verified as early as the first day of August, and should have been verified "forthwith." That assumes that the verification was too late. But they also cite authority to show that it was too soon. This defect, if it was one, was also in the nature of an irregularity which we need not consider further.

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The fifth objection is, that the highway assessment was void because no number of road district, or date of commissioners' warrant was given. We are referred to no provision of the law which requires these details to appear on the assessment-roll, and we have discovered none.

The sixth objection is, that the treasurer's notice of the tax sale was required by the act of 1850, which was then in force, to be delivered to the printer for publication on or before the 1st day of September, 1852, whereas it is dated September 15, 1852, and presumably was not delivered to the printer until at least that date. The day of sale was the first Tuesday in December; the notice of sale was published once in each week for the prescribed ten weeks, as the affidavits of the printers show, and the defect relied on is simply that the notice was not delivered for publication as early as it should have been. The respondents cite authority for the doctrine that the provision for delivery on the first of September is directory only; but whether that be so or not it is certain that the defect was not beyond the remedy of the act of 1882.

The defects thus far considered leave only two remaining which are alleged against the validity of the tax sale of 1852, but these are jurisdictional and go so directly to the authority of the assessors to levy the tax at all that they must be considered on their merits and without aid from the statute of 1882.

A portion of the tax on which the sale of 1852 was made appears to have been a highway tax assessed in 1849, and the appellant claims that at that date there was no law which authorized an assessment for highway purposes upon non-resident lands not occupied or improved. The contention is that section 1 of the act of 1835 which provides that "the real property of non-resident owners improved or occupied by a servant or agent, shall be subject to an assessment of highway labor and at the same rate as the real property of resident owners" should be read as if it contained the words "and those only," and thus, exempting all other non-resident lands from a highway tax, repealed by implication, section 19 of title 1, chapter 16, part 1 and article 2 of the Revised Statutes,

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which made all non-resident lands assessable for highway labor where pierced or adjacent to a road. But later sections of the act of 1835 are inconsistent with this idea and become repugnant and incomprehensible upon any such construction. Its second section amends section 22 of the chapter of the Revised Statutes referred to, and requires the commissioners of highways to make out a list of *all* lots, pieces and parcels of land *owned* by non-residents. What possible need was there of this if only a class of occupied and improved lands of non-residents were to be taxed? Section 3 of the act of 1835, again amends section 24 of the Revised Statutes and provides for assessing every male inhabitant at least one day, and then adds that the residue shall be apportioned upon the estate of every inhabitant of the town *and* upon "each tract or parcel of land of which the owners are non-residents *contained in the list made as aforesaid*." The statute adds that if there still be a deficiency of the labor it shall be assessed upon the estates of the inhabitants and upon each tract or parcel of land of which the owners are non-residents. Surely these contradictions should scarcely be charged upon even a very careless legislature. The consequences of such a construction also challenge our attention. Not only are all unoccupied or unimproved lands of non-residents relieved of the highway burden but even those occupied and improved by persons other than the owners "servants or agents." A tenant is in no just sense either a servant or agent of the landlord. Paying his rent, he is in of an estate of his own, and a non-resident owner might lease his lands to a tenant for years and the property have the benefit of the highways and bear none of the burdens. The only escape would be to treat the tenant as owner and the lands as no longer non-resident. And that suggests the true meaning of section 1. The provisions of the Revised Statutes left open a troublesome question likely to create doubt and disagreement among highway officers. Section 19 commanded that every *person* owning or *occupying* land in the town in which he or she resides, and the lands of non-residents should be assessed for highway labor. If, now, land owned by a non-

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resident should be occupied by a resident agent or servant, in which form should it be taxed? If treated as non-resident land it would be exempt if no road pierced it or adjoined it, and, if assessed, it could only be at the rate of a quarter day's labor for every \$100 of valuation; but if treated as the land of a resident occupant, neither the exemption nor the limitation would apply. This difficulty the legislature solved by the act of 1835. That provided that lands of a non-resident occupied or improved by such owner or his agent or servant should be assessed in the same manner and at the same rate as resident lands. The purpose thus disclosed was obvious. It was to treat lands thus occupied as if belonging to a resident and take them out of the category of non-resident lands. The amendment of 1835 dropped the word "owner" and somewhat changed the phraseology of section 1, but did not alter its purpose or effect; so that the result of the change was to make lands occupied or improved by the non-resident owner's agent or servant assessable against the occupant as resident lands and at the same rate and leave non-resident lands not so occupied or improved to the assessment provided by the statute. This view of the law seems to us reasonable and sensible. It does away with the contradictions to which we have referred, avoids an exemption of non-residents by inference which the legislature would have distinctly directed if that had been the intent, and enables the two statutes to stand together without a repeal by implication. It is said that section 1 of the act of 1835 covers the whole subject and furnishes the entire rule and system, and, therefore, section 19 of the Revised Statutes must be deemed repealed. That assumes the exact point in controversy. We think the section referred to does not cover the whole subject; indeed, but a very small part of it; and deals only with a specified class of non-resident lands. For these reasons we hold that the assessors had jurisdiction and authority to assess the land for highway purposes, unless the final objection taken to that jurisdiction shall prove to be valid.

The sale of 1852 was made when the act of 1850 (chap. 298) was in force. That act expressly repealed articles 2 and

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3 of title 3, chapter 13, part 1 of the Revised Statutes, but with a proviso that such repeal should not affect "any tax levied or assessed *prior* to the year 1849, nor any *proceeding* for the collection thereof by a sale of the lands taxed or otherwise." Such assessments and the proceedings for their enforcement, prior to 1849, were thus left to the operation of the then existing law and not subjected to the new process. The act of 1850 was passed on the tenth day of April in that year. Before its passage, and on or before the first day of that month, the lands here in question had been returned to the comptroller as non-resident lands upon which the taxes remained uncollected. This return had been made by the treasurer in accordance with the then existing law, which in that respect was identical with the provisions of the act of 1850. The claim is now advanced that the latter act was wholly prospective, and that as to non-resident taxes of 1849 no law existed for their collection, the old law having been repealed and the new law being strictly prospective. This reasoning involves a conclusion that the legislature deliberately intended not to collect the non-resident taxes of 1849. Why that should have been so it is impossible to conceive. Such a result produces injustice to the state and violence to that equality of taxation which the law deems both just and essential. Nothing in the terms of the act of 1850 makes the return to the comptroller invalid or ineffectual, and no such purpose is anywhere disclosed. On the contrary, the object of the act was evidently to change proceedings for the collection of non-resident taxes in a single essential particular, which was to place the sale of such lands in the authority of the county treasurer and take it away from the action of the comptroller. The legislature evidently believed that the new provisions, as well as the repealing clause, would affect taxes of previous years, for the act guards against both as it respects the years "prior to" 1849; and its assertion that the repeal of the old law should not affect taxes assessed previous to 1849, or proceedings in progress for their collection, quite plainly implies that the new act was intended to affect the taxes of

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1849 and the proceedings taken thereunder by changing the future and prospective course of such proceedings. The second title of the act relates to sales for unpaid taxes, and provides that "whenever any tax on lands returned to the comptroller" shall remain unpaid, proceedings for a sale shall be initiated. There is no hint in the language used that a return before April 10, 1850, of lands assessed in 1849 is to be excluded, or that the return referred to means only one made under the act of 1850, but the words are general and cover every lawful return to which the new process can by any possibility apply. The trouble with this question has mainly originated in an expression of this court confining the operation of the act of 1850 to cases arising after its enactment. (*Whitney v. Thomas*, 23 N. Y. 581.) There is no doubt of the correctness of that decision upon the question then at bar, but the effect of the act of 1850 upon taxes assessed in 1849 upon non-resident lands and a return to the comptroller, ante-dating that act, was not before the court or at all considered. The trouble there was that lands of a non-resident had been assessed as resident and returned to the comptroller as in arrears. This court correctly held that under the law prior to 1850 there was no authority for a sale by the comptroller of lands assessed to an inhabitant, and the terms of the new law provided a process special and peculiar which had not at all been followed and was pronounced wholly prospective. In that case the old proceedings had been followed, though without authority, and the new proceedings had not been and could not have been pursued. Here the change came at a possible point to be effective. The assessment of 1849 was valid, and the return to the comptroller lawful and regular under either statute, for so far they did not differ. The future proceedings could not go on under the repealed law but could and were intended to be conducted under the new and substituted system. This view of the statutes is natural and reasonable and avoids a public mischief and consequences assuredly not within the contemplation of the legislature.

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The defendants, therefore, established their title, and the decision of the courts below was correct.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Upon a subsequent motion for reargument the following opinion was handed down.

FINCH, J. A motion is made in this case, after the filing of the remittitur in the court below and the entry of judgment thereon, that we address a request to such court to vacate the judgment and return the remittitur with a view to a reargument of the appeal.

I have examined the criticisms upon the opinion delivered with all the care which the importance of the case demands, and with a desire to correct any error which may have been committed, but ending in a conviction that no ground for ordering a reargument exists:

1. It is said that the opinion in reciting the statute of 1882, omitted the word "valuable" as qualifying the word "improvements." As there was no pretense in the case that any improvements, valuable or not, had been made upon the premises before that act, such literal repetition of the language was totally immaterial to the point in dispute, and only the material purport of the statute was intended to be stated.

2. That no specific reference to the Federal Constitution was made is true, but the provisions of the State Constitution are equally broad upon the question argued, and similar considerations apply to each.

3. This court did not hold in *Howard v. Moot* (64 N. Y. 262 268) that such an act as that of 1882, making evidence conclusive of regularity, is unconstitutional. The court only said, in substance, that even if that were so it would not affect the case then under consideration.

4. It is intimated that we were mistaken in saying that the assessor's certificate was written on the assessment-roll. It so

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appears in the copy of assessment-roll used as an exhibit, and there is no suggestion in the case to the contrary. If the fact were not so, and the certificate was attached to the roll, the argument and the conclusion would remain the same.

5. Finally, passing over one or two suggestions that require no answer, our attention is called to the case of *Shattuck v. Bascom* (105 N. Y. 39). We there held a defect in the assessor's affidavit fatal to the assessment. We did not speak of the defect as jurisdictional, though if we had, no collision of authorities would have resulted. The opinion in the present case is careful not to deny a possible fatal result of the defect, although it is rather formal than substantial, but for the curative effect of the statute of 1882, which had no parallel in any form in the facts of the cited case. In the opinion then delivered the defect was not deemed jurisdictional in any other sense than the modified one of an essential condition under the law *as it stood*. Whether it was *so* jurisdictional as that the legislature could not have dispensed with it, and, therefore, could not cure its omission is a very different inquiry. A defect may be in one sense jurisdictional relatively to the authority of the assessors acting under an existing law, and yet not so as it respects the power of the legislature to pass a statute curing the defect; and it is only by confusing these two things, which the opinion separated, that a seeming contradiction can be reached.

The motion, therefore, should be denied, with \$10 costs.

All concur.

Motion denied.

GEORGE N. MANCHESTER et al., Respondents, v. PHILIP
BRAEDNER, Appellant.

Where one delivers to another an order on a third person to pay a specified sum to the payee, the natural import of the transaction is that the drawee is indebted to the drawer and the latter is indebted to the payee in the sum specified, and that it was given to the payee as the means of paying or securing the payment of his debt.

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Such an order, therefore, in the absence of evidence showing a different relation between the drawer and payee is an acknowledgment in writing by the former of a debt within the statute of limitations (Code Pro., § 110; Code Civ. Pro., § 895), and continues the debt for a period of six years from its date.

Such an order does not import that the debt so acknowledged is only to be paid out of the fund against which it is drawn.

To constitute an acknowledgment of a debt, such as will take it out of the statute, the writing must acknowledge an existing debt, and must contain nothing inconsistent with an intention on the part of the debtor to pay.

Oral evidence, however, may be resorted to, as in other cases of written instruments, in aid of the interpretation.

(Submitted October 14, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made January 9, 1885, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was commenced June 20, 1882, to recover for building materials furnished and delivered by plaintiffs to defendant. The defense was the statute of limitations.

It appeared that defendant in February, 1876, entered into an agreement with one Hoover, who was engaged as contractor in building certain houses, to do all the plastering for a sum agreed upon, payable in installments as the work progressed. Plaintiffs agreed to furnish the materials, defendant agreeing to pay therefor in cash as wanted. In pursuance of this agreement plaintiffs furnished, between March 1 and June 12, 1876, materials from time to time as ordered. About that time Hoover became embarrassed and abandoned the work. The sub-contractors, and among them defendant, entered into an arrangement with Hoover to continue the work, and defendant delivered to plaintiffs three orders on Hoover, dated June 21, 1876, for sums aggregating the amount of their bill, payable, as the work progressed, from the sums coming to him under his contract. Defendant resumed his work, but in a few days abandoned it and refused to go on with the same.

Philip L. Wilson for appellant. Plaintiffs' account in this action is not a mutual open and current account under section

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386 of the Code of Civil Procedure. (*Peck v. N. Y. and L. S. S. Co.*, 5 Bosw. 226, 236; *Green v. Disbrow*, 79 N. Y. 1, 9.) An order given, intended to be payment in full, is not an acknowledgment of an existing debt. (*Berrean v. Mayor, etc.*, 4 Rob't. 538; *Arnold v. Downing*, 11 Barb. 554.) The admission or promise must be absolute. These orders are conditional. (*Ross v. Ross*, 6 Hun, 81.) The acceptance of a non-negotiable promise of payment does not *suspend* the remedy. (*Gallery v. Prindle*, 14 Barb. 186; Wait's Actions and Def. 294, § 4; *Franklyn v. Robinson*, 1 Johns. Ch. 157; *Mullett v. Shrump*, 37 Ill. 107; *Scouten v. Eislord*, 7 Johns. 36.) The Code requires the acknowledgment or promise to be in writing, but does not alter the effect of a payment; however, the payment must be on account. (*Henry v. Root*, 33 N. Y. 528; *Purdy v. Austin*, 3 Wend. 187; *Bell v. Morrison*, 1 Peters, 351; *Stafford v. Bryan*, 3 Wend. 532; *Bloodgood v. Bowen*, 4 Seld. 362.)

Charles De Kay Townsend for respondents. Until after the 21st of June, 1876, the plaintiffs had no cause of action against defendant, and until then the statute of limitations did not commence to run. (*Pursell v. Fry*, 19 Hun, 595; *Smith v. Velie*, 60 N. Y. 111; *Schack v. Garrett*, 69 Penn. St. 144; *Eliot v. Lawton*, 7 Allen (Mass.) 274; *Little v. Smiley*, 9 Ind. 116.) The signing and delivery by defendant of the three orders on Wm. H. Hoover was an acknowledgment in writing sufficient with section 395 of the Code of Civil Procedure to take the case out of the statute of limitations. (*Smith v. Ryan*, 66 N. Y. 352; *Henry v. Root*, 33 id. 528; Wood on Lim. §§ 64-81; *Irving v. Veitch*, 3 M & W. 112.)

ANDREWS, J. When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is, that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying or securing the payment of his debt. In

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other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order and a willingness on the part of the debtor to pay the debt. The transaction may be consistent with a different relation and another purpose, but in the absence of explanation, that is its natural and ordinary meaning. (See *Bogert v. Morse*, 1 N.Y., 377.) The oral evidence shows that the defendant was owing the plaintiffs the amount specified in the several orders of June 21, 1876, and that they were given to secure the payment of the debt, thus fully corroborating the inferences deducible from the orders themselves. We think the orders constituted an acknowledgment in writing of the debt, within section 110 of the Code, and continued the debt for the period of six years from their date. The decisions as to what is a sufficient acknowledgment of a debt, to take it out of the statute are very numerous and not altogether harmonious. It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted. (*Kincaid v. Archibald*, 73 N. Y. 189; *Lechman v. Fletcher*, 3 Tyrw. 450; *Bird v. Gammon*, 3 Bing. [N. C.] 883), or to explain ambiguities. (1 Smith's Lead. Cas. 960, and cases cited.) The promise to be inferred from the order was not conditional in the sense that the debt was to be paid only out of the fund in the hands of the drawee. At most, there was an appropriation of that fund for the payment of the debt, but the language of the orders did not import that the debt was to be paid only out of the fund against which they were drawn. (See *Winchell v. Hicks*, 18 N. Y. 558; *Smith v. Ryan*, 66 id. 352.) The defendant by his own act in abandoning the contract with Hoover, the drawee, prevented the payment of the

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orders and left him subject to the general obligation of payment resting upon all debtors.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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ALFRED ROE et al., Executors, etc., Respondents, v. CAROLINE A. STRONG et al., Appellants.

A local history is not competent evidence upon the question as to the date when possession and occupancy of land by a private individual began.

It seems the presumption is, that the title of a person in possession of upland adjoining Setauket bay, in the town of Brookhaven, Long Island, before the Nichol's patent to that town of 1686, extended to high-water mark.

As to a possession originated after said patent and a title derived under it, it *seems* the cliff is the boundary on the water side, leaving a strip of land along the shore above high-water mark, which was reserved for common use.

By virtue of said patent and the Dongan patent of 1686 and the confirmation thereof by the Colonial government, the said town was vested with title to the lands under the waters of the bays and harbors included within the boundaries of the patents, as well as to the uplands not already the subject of private ownership.

The title to the lands under water vested in the town, subject to the public right of navigation, and *it seems* the town may not alienate the title so acquired to the material prejudice of the common right.

A title in fee will not be implied from user, where an easement only will secure the privilege enjoyed.

Where, under grant made by the trustees of said town, an individual erected a wharf and a bridge over the water of the bay. *Held*, that if the grant was unlawful and the construction an unlawful obstruction of navigation, the wrong could not be redressed by action brought by an individual who had suffered no special injury; that plaintiffs in such an action had no standing unless they established that the title of the town had been divested and had been acquired by them.

In an action of trespass to recover damages for the erection of the wharf and bridge, plaintiffs claimed under an unrecorded deed executed by S. in 1768, which purported to convey "a certain piece of salt thatch" by lines which included the *locus in quo*. Plaintiffs proved that from time to time the grantees under the deed cut the salt thatch growing

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on the premises, and that one of them leased to another the right to cut thatch; there was no evidence that the town in any way ever recognized any title under the deed or that it had any notice of it. The premises were never enclosed, but remained open, subject, without obstruction, to the ebb and flow of the tide and to the uses of a public landing place. It also appeared that the trustees of the town exercised jurisdiction over the part of the shore in question and inconsistent with the claim of title made by plaintiffs. *Held*, the evidence failed to show any title by adverse possession; that assuming the town was cognizant of the acts of S. and his grantees in cutting the thatch, that they claimed an exclusive right and that it acquiesced therein, this, at most, gave plaintiffs simply a prescriptive right as against the town to take the thatch; it did not confer a title to the soil

(Argued October 19, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 9, 1884, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury.

This action was brought to recover damages for an alleged trespass and to compel the removal of the structures complained of.

The complaint alleges that plaintiffs are owners of certain premises situate at Setauket, in the town of Brookhaven, Suffolk county, adjacent to and in front of an arm of Setauket Harbor, and a navigable bay or arm of the sea; a public highway and so used for many years; that defendants are owners of a parcel of land called Strong's Neck, situate upon the opposite shore of said bay, and which connects with the main land, where plaintiffs' premises are situated, by a public highway around the shore, and which was the usual means of communication between Strong's Neck and the village of Setauket. It also alleges that in July, 1879, the defendants wrongfully commenced, and at the time of bringing the action continued, the erection of a bridge from Strong's Neck to the main land and over and across the bay; sunk piles in the land under water, and also on the plaintiffs' lands; that its southwestern terminus was built or was intended to be built upon

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plaintiffs' lands; and that for such purpose defendants unlawfully entered upon their lands; that defendants have unlawfully raised or changed the grade of plaintiffs' lands between such terminus and the highway, and in so doing have unlawfully entered upon their property; that such structure is a barrier to the passage of vessels, and will prevent their passage beyond plaintiffs' premises, and that they will be compelled to stop in front and discharge their cargoes thereon; and that by the acts aforesaid defendants have encumbered and injured plaintiffs' lands. The answer admits the erection of the bridge and dock or wharf, but denies plaintiffs' title to the *locus in quo*.

The facts appearing on trial and found are substantially stated in the opinion.

A. A. Spear for appellants. The title of the plaintiffs derived from Woodhull is void for want of title in the grantor, and for not containing a definite description, which embraces any ascertainable piece of land. (*Miller v. Long I. R. R. Co.*, 71 N. Y. 380; *Wheeler v. Spinola*, 54 id. 377; *Gardner v. Hart*, 1 id. 528.) The charters of the town of Brookhaven vest title to all the harbors, shores, etc., within the town boundaries, in the trustees of the town. (*Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Hand v. Newton*, 92 id. 88.) No adverse possession has been established. (*Wheeler v. Spinola*, 54 N. Y. 377; *Miller v. Downing*, id. 631; *Pope v. Hanmer*, 8 Hun, 265; *Lane v. Gould*, 10 Barb. 254; Code of Civ. Pro. §§ 370, 372; *Miller v. L. I. R. Co.*, 71 N. Y. 380; *Thompson v. Burhans*, 79 id. 93.) The grant from the trustees to Thomas S. Strong and his heirs, made in 1825, though not put in operation till 1878, is still valid. A grant of a license or easement by deed cannot be lost by nonuser. (*Pope v. O'Hara*, 48 N. Y. 446; *Wiggins v. Cleary*, 49 id. 346; *Jewett v. Jewett*, 16 Barb. 150.) By statute the commissioners of highways are charged with the regulation of public landings, and they had authority to permit the improvement of this one. (Laws of 1864, chap. 514; *Hecker v. N. Y. Bal. D. Co.*, 24 Barb.

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215; Laws of 1813, chap. 43; Laws of 1830, chap. 56; *Post v. Pearsall*, 22 Wend. 460.) If the respondents own the fee of this land subject to the public use of it as a landing, even then they cannot claim damages on the ground that this structure is an increased burden upon the land. (*Hamilton v. N. Y. C. R. R. Co.*, 9 Paige, 171; *People v. Kerr*, 27 N. Y. 188; *Plant v. L. I. R. R. Co.*, 10 Barb. 508; *Wetmore v. Story*, 22 id. 414; *Drake v. H. R. R. Co.*, 7 id. 508; *Chapman v. Alb. & Schenectady R. Co.*, 10 id. 360; *Kelsey v. King*, 33 How. 49.) The trustees had power to make the grants to appellants and their ancestor. (*Trustees, etc. v. Strong*, 60 N. Y. 56; *Robins v. Ackerly*, 27 Hun, 499; *Hand v. Newton*, 92 N. Y. 88; *Vingut v. Seatauket Church*, 32 Hun, 69; 102 N. Y. 672.)

John J. Macklin for respondents. The homestead title is a valid title to the land to the bay, and the title of Floyd was not limited by the line of high-water, but extended to low-water line. (Duke of York's Laws, 354, 359, 378, 410, 413, 419; Statutes of the Colonial Leg. [Bradford's Laws], 2, 4; *Storer v. Freeman*, 6 Mass. 435, 438, 439; *Sale v. Pratt*, 19 Pick. 191; *Com. v. Charleston*, 1 id. 180; Gould on Waters, §§ 37, 169, 175; *Com. v. Alger*, 7 Cush. 52, 70; *Bogardus v. Trinity Ch.*, 4 Paige, 178; *Clement v. Burns*, 43 N. H. 609, 617, 619, 621; *Lapish v. Bangor*, 8 Green [Me.], 85; *Baker v. Bates*, 13 Pick. 255; *Com'rs v. Kempshall*, 26 Wend. 404, 413; *Canal Com'rs v. People*, 5 id. 447; *Canal App'rs v. People*, 17 id. 621; *Martin v. Wardell*, 16 Pet. 413.) The deed of Brewster to Seaton of 1768 and the subsequent conveyances, supported by open and notorious acts of possession and claim of ownership, are sufficient evidence to warrant the presumption of a grant from the crown or town trustees if they had title under the colonial patents. (Angell on Tide-waters, 271, 280, 283, 286; *Palmer v. Hicks*, 6 Johns. 133, 134; Gould on Waters, §§ 21, 22, 25, 33; 4 Greenl. Cruise, 342; 268, § 47; *Coleman v. Man. Co.*, 94 N. Y. 229; *Dawley v.*

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Brown, 79 id. 390.) All the facts necessary to support an action by a riparian owner to compel the removal of a structure erected between high and low-water line are set forth in the complaint, and if the plaintiffs have no title to the *locus*, the action may be treated as one by a riparian owner to compel the removal of a structure in front of his premises. (*Clement v. Burns*, 43 N. H. 609, 617, 620; *E. Haven v. Hemmingway*, 7 Conn. 186, 202, 203; *Gould v. H. R. R. Co.*, 6 N. Y. 522; *People v. Tibbits*, 19 id. 523; *Stevens v. Patterson*, 5 Vroom. 532.) The sovereign of the state is the source of title to all property. As to the land, other than the soil under navigable waters, or the navigable waters, the title is absolute and might be granted at pleasure; as to the soil under navigable waters, and the navigable waters, the title was of a twofold nature; as to the soil a proprietary title in trust for the people; as to the waters, a title which pertained to the sovereignty alone and could not be aliened. (*Gould v. H. R. R. Co.*, 6 N. Y. 546-549; *Smith v. City of Rochester*, 92 id. 463, 478; *Martin v. Wardell*, 16 Pet. 368, 414; *Com. v. Charleston*, 1 Pick. 180; *Goodwin v. Thompson*, 54 Am. R. 410; *Gould on Waters*, §§ 17, 24; *Hone v. Richards*, 4 Call. [Va.] 441; *Norfolk v. Cook*, 27 Gratt. 43; *Stover v. Freeman*, 6 Mass. 435; *Sale v. Pratt*, 19 Pick. 191; *Pollard v. Hogan*, 3 How. [U. S.] 212, 228; *Langdon v. Mayor, etc.*, 93 N. Y. 128, 155.) In the construction of patents from the colonial government to local communities, it was uniformly held that words similar to those used in the patent to the Duke of York, such rivers, harbors, waters, etc., did not transfer the title of the crown thereto or to the soil, but only civil or criminal jurisdiction thereover. (*Gould, on Waters*, §§ 30, 35; *Canal Com'rs v. People*, 5 Wend. 460-463, *Martin v. Wardell*, *supra*; *People v. Canal Apprs.* 33 N. Y. 460, 475, 500; *Mahler v. Norwich Co.*, 35 id. 352, 360; *Laws of 1847*, chap. 115; *Laws of 1852*, chap. 285; *Gerard's Water Rights*, 51-56, 223, 276, 284; *Laws of 1835*, chap. 232; *Laws of 1850*, chap. 232, § 2; *Laws of 1856*, p. 216; *Laws of 1871*, chap. 253.) The use of the shore as a place of landing by the inhabitants

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is not sufficient to establish a landing place or the presumption of a grant by the riparian owner. (*Pearsall v. Post*, 20 Wend. 111, 122, 132, 133; *S. C.*, 22 id. 425; Angell on Tide Waters, 181; *Green v. Chelsea*, 24 Pick. 33; *Cooper v. Smith*, 9 Serg. & R. 71.) If, however, a dedication can be presumed, the mode in which it has been used cannot be changed without the consent of the owner. (Angell on Tide Waters, 194; Angell on Water Courses, § 144; *Emmons v. Turnbull*, 2 Johns. 313; *Cortelyou v. Van Brunt*, id. 357; Washburn on Easements, §§ 117, 370; *Post v. Pearsall*, 22 Wend. 425, 434, 438, 447, 450, 451, 455; Gould on Waters, § 193.) The legislature even could not authorize the erection of the bridge, and an act condemning lands for such use would be unconstitutional. (*In re Eureka Co.*, 96 N. Y. 42.) The ancestor of plaintiffs did not lose his title to the bed of the road in consequence of the dedication or the laying out and recording of the highway. (*Gidney v. Earl*, 12 Wend. 98.) It was competent to show the claim of title to the meadow, and that an action was brought to maintain the title, and that, at least, one of the defendants knew of it. (*Trustees v. Kirk*, 68 N. Y. 465.) The colonial patents of 1666 and 1668 were not grants of land, and if construed as grants of land, they did not grant the navigable waters within the town limits or the soil thereunder. (1 Bancroft [Protest of Mass. Colonists], 226, 271, 373, 498, 523; 2 Brodhead's Hist. N. Y. 109; Wood's Hist. L. Island, 9, 13, 14, 73; Duke of York's Laws [1664], 354; Report Gov. Hunter in 1716; 5 Doc. relating to Col. Hist. N. Y. 411; Opinion Att'y Gen. Colden; 1 Doc. Hist. N. Y. [1732], 250; Kent's Charters, notes 4, 6, 12, p. 208; § 1, p. 61-64; note 14, p. 212, 140, 142; § 36, note 67, p. 266; 1 Hoffman's Corp. 28, § 6, p. 34; 1 Hoffman's Treatise on Corp. as Proprietor, 78, 284; *People v. Vanderbilt*, 26 N. Y. 287; 28 id. 396; *Orr v. Brooklyn*, 36 id. 661; 4 Greenl. Cruise, tit. D., 343, 268; *Jackson v. Halstead*, 5 Cow. 216; *Dermot v. State*, 99 N. Y. 101, 107; *Langdon v. Mayor, etc.*, 93 id. 129, 146, 148.)

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ANDREWS, J. The judgment requires the defendants to remove the wharf and bridge erected by them, from the upland on the southerly side of Setauket harbor, and also from that part of the shore adjacent to the upland, between high-water mark, and the northerly line of land described in a deed executed in 1768, by one Seaton, under which plaintiffs claim. The judgment rests upon the finding that the plaintiffs are the owners of the upland and of the adjacent shore up to the line in the Seaton deed.

The plaintiffs, on the trial, rested their case upon the claim that they had the legal title to the upland and the shore, and that the erections of the defendants were an invasion of their right of property in the soil. If the plaintiffs own the upland, but not the shore, the judgment is too broad; and if they have title neither to the upland nor the shore, they were not, upon any facts appearing in the record, entitled to any relief. The plaintiffs rely upon two claims of title, (1), what is termed "the homestead title," and, (2), their title under the Seaton deed. It is conceded that Richard Floyd, the ancestor of the plaintiffs, settled upon a tract of about fifty acres of land, situate on Setauket harbor, in the present town of Brookhaven, more than two centuries ago, and that this tract, called the homestead, has ever since remained in possession of his descendants. The origin of his title is not shown. The plaintiffs offered and read in evidence, under objection, an extract from Thompson's History of Long Island, with a view of establishing that Richard Floyd's possession ante-dated the Nicolls patent of 1666. This evidence was incompetent. (*McKinnon v. Bliss*, 21 N. Y. 206; 1 Greenl. on Ev. § 497.) They also proved a tradition that the Floyds came to this country about 1646, and afterwards settled on Setauket harbor, but in what year there is no definite proof. On a new trial the requisite evidence may be given. The point is material upon the question whether the homestead lot was bounded on the north by the water. If Richard Floyd's possession ante-dated the Nicolls patent, there would be a strong presumption that his title, however derived, extended

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to high-water mark. The fifty acres is adjacent to the harbor, and in the absence of evidence to the contrary, it could not be supposed that the persons from whom Richard Floyd derived title, reserved a strip a few rods wide along the shore, thereby cutting him off from access to the water over his own land. There is no evidence of any such reservation in titles acquired prior to the Nicolls patent, and the Duke of York's laws, enacted in 1665, the year preceding the granting of the patent, confirmed the title of the then settlers to the lands in their possession. If, however, the possession of Richard Floyd, the ancestor, originated after the Nicolls patent, and his title is derived thereunder, then it seems probable that the cliff was the boundary on the water side, leaving a strip of land along the shore above high-water mark which was reserved for common use. It seems to have been the practice of the towns of Long Island to make this reservation in the allotment of common lands held under patents from the colonial government. (See *Trustees of East Hampton v. Kirk*, 68 N. Y. 459.) The defendants, in confirmation of the claim that the practice prevailed in respect to allotments of the common lands of the town of Brookhaven, produced the ancient town records of the town, from which it appears that at a meeting of the trustees, February 5, 1755, it was voted and agreed that "ye lots that were laid out on the sound and harbors, were designed to extend to ye bottom of ye cliffs against ye said lots," and it also appears from the same records that Col. Richard Floyd, then the owner of the homestead tract, was, during that year, one of the trustees of the town.

But passing this question, which, by evidence on a new trial may be freed from obscurity, and assuming that the plaintiffs' boundary of the upland extends to high-water mark, we are of opinion that they failed to establish title to any part of the shore over which the bridge was built, or any injury to their rights as riparian owners which entitled them to a judgment requiring the defendants to remove that part of the bridge extending below high-water mark to the line of the Seaton deed. The construction of the patent granted by Governor Nicolls

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in 1666, to the trustees and freeholders of the town of Brookhaven, and of the confirmatory patent of Governor Dongan, granted in 1686, was elaborately considered by this court in the case of the *Trustees of Brookhaven v. Strong* (60 N. Y. 56). It was held in that case that by virtue of these patents and the confirmation thereof by the colonial legislature, the town was vested with the title to the lands under the waters of the bays and harbors included within the boundaries of the patent, as well as to the uplands not already the subject of private ownership. The grant under these patents was in trust for the use of the inhabitants of the town. It is well known that titles to large tracts of land in various towns of Long Island are held under similar patents. The uplands have, to a great extent, by grants from the towns, become the subject of private property. The public trust has been subverted by grants to individuals in severalty, the towns receiving the consideration. The title to the soil under navigable waters vested in the Long Island towns under the colonial patents was, undoubtedly, subject to the public right of navigation, and it would seem to follow that the towns could not alienate the title so acquired to the material prejudice of the common right. But whatever limitations may have been imposed upon the title of the town of Brookhaven for the protection of the public in the use of navigable waters, it is no longer an open question that the colonial patents to the Long Island towns vested in the towns the legal title to the soil under the waters of the bays and harbors within the bounds of the patents. (*Gould v. James*, 6 Cow. 369; *Rogers v. Jones*, 1 Wend. 237; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Hand v. Newton*, 92 id. 88; *Robins v. Ackerly*, 91 id. 98; *Mayor, etc. v. Hart*, 95 id. 451.) The plaintiffs, therefore, who assert a title to that part of the shore of Setauket harbor, on which the bridge is erected, are met in the first instance by the fact that the title was originally in the town. They have no standing until they establish that the title of the town has been divested, and has been acquired by them. They do not show any deed from

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the town, or any agreement or writing on the part of the town recognizing their title or that of the grantors. They proved a deed from Joseph Brewster to Andrew Seaton, dated June 21, 1768, which purports to convey "a certain piece of salt thatch," by lines which include the *locus in quo*, and they trace their record title from this source. In addition, they proved that from time to time the grantees, under the Seaton deed, cut the salt thatch growing on the premises, and that one of them for several years leased to one Rogers the right to cut the thatch, and some other circumstances of a like nature. There is no proof that the town in any way recognized any title in Seaton or his grantees to the shore, nor, indeed, is there any evidence that the town had any notice of the deed. It was never recorded, nor was there any recorded conveyance describing these premises in the whole chain of title under the Seaton deed until 1866, a century after that deed was executed. What title, if any, Brewster had is not disclosed, and the evidence falls far short of establishing a title in his grantees by adverse possession. The premises embraced in the deed were never inclosed, but remained open, subject without obstruction, to the ebb and flow of the tide and to the uses of a public landing place. The trustees of the town, after the execution of the Seaton deed and down to the time of the commencement of this action, exercised jurisdiction over the part of the shore in question, and from time to time granted privileges wholly inconsistent with the claim of title made by the plaintiffs. Assuming that the town was cognizant of the acts of Seaton or his grantees in cutting the thatch, and that they claimed an exclusive right, and acquiesced therein, this, at most, would give them a prescriptive right, as against the town, to take the thatch, without conferring a title to the soil, which would be unnecessary to the enjoyment of the right. In other words, a title in fee would not be implied from user where an easement only would secure the privilege enjoyed. (See Hale on Sea Shore, 217; Gould on Waters, § 22.) The prescriptive right acquired, if any, was analogous to a *profit à prendre*, appurtenant to some particular estate, and it may

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be doubtful whether it could be granted alone, or could exist severed from the estate to which it was attached. (See COWEN, J., in *Pearsall v. Post*, 20 Wend. 123; *Waters v. Lilley*, 4 Pick. 145; *Perley v. Langley*, 7 N. H. 233; 2 Green Ev. 540; Angell on Tide Waters, 272; Gould on Waters, § 25.) We think the plaintiffs failed to establish a title to the shore of the bay, and that there is no evidence that the title of the town under the Nicolls patent has been divested.

It is not material to inquire whether the grant of the right to construct a bridge over the bay, made by the trustees of the town to the defendants in 1878, was valid. If the construction of the bridge over the waters of the shore is an unlawful obstruction to navigation, the wrong may be redressed by appropriate proceedings in behalf of the public. It does not appear that the plaintiffs have suffered any special injury, and upon the facts proved they have no standing to maintain an action for the removal of the bridge, in the absence of legal title to the soil. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44.)

The judgment should be reversed, and a new trial granted. All concur.

Judgment reversed.

LAWRENCE J. CALLANAN et al., Respondents, v. GEORGE F. GILMAN, Appellant.

A tradesman may convey goods from a street to his adjoining store, and from the store to the street, and for that purpose may temporarily obstruct passage on the sidewalk. But such an obstruction must not only be necessary, with reference to the business of the tradesman, it must be reasonable with reference to the rights of the public.

Defendant, a wholesale and retail grocer, having a store on a street in the city of New York, was in the habit of taking goods to and from his store by means of trucks. When loading or unloading a bridge was placed across the sidewalk, entirely obstructing it; and elevated above it at the inner end about twelve inches, at the outer about twenty. Persons passing when the bridge was in place were obliged to step upon the stoop of defend-

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ant's store and go around the end of the bridge which rested thereon. The bridge was usually removed when not in use, but it was sometimes left in position for ten or fifteen minutes, and when in use it sometimes remained in position from one to two hours, and on an average the sidewalk was thus obstructed from four to five hours of each business day between 9 A. M., and 5 P. M. *Held*, that such an extensive and continuous use of the sidewalk was not reasonable, and constituted a nuisance.

In an action to restrain the continuance of the nuisance, the complaint set forth the facts above stated, and also alleged, in substance, that plaintiffs were engaged in the same business and occupied the store adjoining defendant's; that a large portion of plaintiffs' customers, in order to reach their store, were obliged to pass in front of defendant's store; that the said obstruction prevented plaintiffs, their employes and patrons, from passing along the sidewalk to and from plaintiffs' store, to the great detriment and injury of plaintiffs and their said business. *Held*, that there were sufficient averments of special damage to warrant proof of such damage, and upon such proof being made, to sustain a judgment granting the relief sought; that if the complaint was not sufficiently definite in its statements as to such damages, defendant should have moved to make it more definite, or for a bill of particulars; and, having taken issue and gone to trial, it was too late to object.

There was proof that some custom was turned from plaintiffs' store on account of the obstruction. *Held*, that this, with the other facts stated, justified a judgment in their favor; also, that defendant could not justify the unreasonable obstruction by proof that he permitted pedestrians to pass around over his elevated stoop or through his store.

The judgment restrained defendant, his agents, etc., from obstructing the sidewalk in front of his store "by any plank-way or bridge, or other like obstruction elevated above the sidewalk, or from hindering plaintiffs, their employes and customers from the free and unobstructed use of the sidewalk." *Held*, that the judgment was too broad. Ordered, therefore, that it be modified so as to require the defendant to "refrain from unnecessarily and unreasonably obstructing" the sidewalk.

The refusal of a trial judge to find on questions of fact is not fatal to his judgment where the findings asked were not material to the decision of the case, or would not be beneficial to the party asking them.

(Argued October 20, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 18, 1885, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term. (Reported below, 20 J. & S., 112.)

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This action was brought to restrain defendant from obstructing the sidewalk in front of his store in Vesey street, New York city.

The material facts are stated in the opinion.

Henry Schmitt for appellant. The defendant did not unlawfully obstruct the street. (*People v. Cunningham*, 1 Denio, 524, 530.) The obstruction of the highway is lawful when it becomes reasonably necessary for the transaction of business. (*Comm. v. Passmore*, 1 S. & R. 219; *People v. Cunningham*, 1 Denio, 530; *People v. Horton*, 64 N. Y. 610, 613; *Welsh v. Wilson*, 101 id. 254, 257.) The plaintiffs failed to establish that defendant was maintaining a public nuisance. (Wood on Nuisances, §§ 259, 261, 746, 750, 753, 801; *Williams v. N. Y. C. R. R. Co.*, 18 Barb. 232; *Knox v. Mayor, etc.*, 55 id. 404; *Trenor v. Jackson*, 46 How. 389; *Ely, Mayor, etc., v. Campbell*, 59 How. Pr. 333; 20 Alb. Law Jour. 183; *Merritt v. Fitzgibbons*, 2 N. Y. 30; *Leigh v. Westervelt*, 2 Duer, 618; High on Injury [2d. ed.], § 767; *People ex rel. v. Kelley*, 76 N. Y. 475; *Hinchman v. Pat. Horse R. R. Co.*, 17 N. J. Eq. 77; *B. & S. A. T. Co. v. C. & A. R. R. Co.*, 2 Harr. 314; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Hatch v. V. C. R. R. Co.*, 25 Vt. 67; *Matthews v. Kelsey*, 58 Me. 56.) No person can maintain an action for damages from a common nuisance where the injury and damages are common to all. (Wood on Nuisances, §§ 618, 619, 632, 654; 1 Coke's Inst. 56, note *a*; *Baxter v. W. T. Co.*, 22 Vt. 114; *Hutchinson v. R. R. Co.*, 28 id. 142; *Iveson v. Moore*, 1 Ld. Raym. 486; *Rose v. Miles*, 4 M. & S. 101; *Greasley v. Codling*, 2 Bing. 263; High on Inj. [2d ed.], § 762; *Pierce v. Dart*, 7 Cow. 609; *Doolittle v. Sup'rs*, 18 N. Y. 155; *Jutte v. Hughes*, 67 id. 271; *Francis v. Schoellkopf*, 53 id. 152; *Knox v. Mayor, etc.*, 55 Barb. 404; Bliss' Code, 293, notes *l*, *m*, *n*, *p*, *r* and *t*; *Green v. N. Y. C. & H. R. R. R. Co.*, 12 Abb. [N. S.] 124; *Hallock v. Miller*, 2 Barb. 630; *Tobias v. Harland*, 4 Wend. 537; *Havemeyer v. Fuller* 60 How. Pr. 322; *Bergmann v. Jones*, 94 N. Y. 51; 2 Story's Eq. Jur. § 924, and note; *Heckinstein's Appeal*,

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70 Penn. 81, 102.) For a nuisance which affects the whole public the remedy is by indictment or abatement at the suit of the attorney general. (*People v. Loehfelm*, 102 N. Y. 1; Wood on Nuisances, § 729; *Renwick v. Morris*, 3 Hill, 621; 7 Hill, 575; *Ely v. Sup'rs*, 36 N. Y. 297; *Barclay v. Comm.* 25 Penn. St. 503; Penal Code, § 387; High on Inj. [2d ed.], § 762.) It will not suffice that the person complaining merely shows a violation of his rights. He must show such a violation as is or will be attended by serious damage. (*Bigelow v. Hart. B. Co.*, 14 Conn. 565; Penal Code, §§ 385, 386; *Cowan v. Whitesides*, 81 Ind.; 2 Alb. Law Jour. 32.) If a private action could be maintained, it should have been an action of nuisance, not a suit for injunction. (*Remington v. Foster*, 42 Wis. 608; Wood on N. §§ 778, 780, 785, 799, 817; *Parker v. W. L. C. & W. Co.*, 2 Black 545; *Hamilton v. N. Y. & H. R. R. Co.*, 9 Paige Ch. 173; Bliss Code [2d ed.] 543, § 627, notes *n, o, p, q, r, s*; *Child v. Douglass*, 5 D. M. & G., 741; Story's Eq. [12th ed.], § 924; High on Inj. [2d ed.], §§ 744, 761, 763; *Higbee v. Cam. & A. R. R. Co.*, 20 N. J. 435.) Whether a particular use is an unreasonable use and a nuisance, is a question of fact to be judged of from the circumstances of each case by the jury. (Wood on N. § 251; *Wetmore v. Tracy*, 14 Wend. 250; *Comm. v. King*, 13 Metc. [Mass.] 115; *Harlow v. State*, 1 Ia. 439; Angell on Highways, 206; *Ladie v. Arnold*, 1 Salk. 168; *Harrower v. Ritson*, 37 Barb. 301; 1 Hawk P. C. 76, §§ 48-60; *James v. Hayward*, Cro. Car. 184; *Rogers v. Rogers*, 14 Wend. 131; Code Civil Pro. § 968; *Hudson v. Caryl*, 44 N. Y. 553; *Powell v. Foster*, 59 Ga. 790.) In the absence of evidence, that at such times as the skid was in position, it was unreasonably used, such use of the skid does not constitute such kind of special damage which plaintiffs must prove to sustain the action, nor does it entitle plaintiffs to the injunction granted herein. (*Welsh v. Wilson*, 101 N. Y. 257; *Baxter v. Turnp. Co.*, 22 Vt. 114.) The court erred in allowing proof of special damages when it was not alleged in complaint. (*Maloney v. Dows* 15 How. Pr. 261, 265; *Squier v.*

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Gould, 14 Wend. 159; *Havemeyer v. Fuller*, 60 How. Pr. 316, 319, 322; *Low v. Archer*, 12 N. Y. 282; *Solms v. Lias*, 16 Abb. Pr. 311; *Baldwin v. N. Y. & H. N. Co.*, 4 Daly, 314; *Parsons v. Sutton*, 66 N. Y. 96; Wood on N. [2d ed.] 1007.) A temporary obstruction of the travel on the streets for business purposes is lawful. (*Welsh v. Wilson*, 101 N. Y. 254.)

John E. Parsons and *Edwin M. Wight* for respondents. Every unreasonable obstruction of the public streets is a nuisance in law, and although there are certain circumstances which may mitigate or even excuse the obstruction, unless such circumstances shall be clearly shown to exist, the obstruction is a nuisance in law. (Wood on Nuis. 250-252, 259; *Comm. v. Passmore*, 1 S. & R. 219; *Rex v. Russell*, 6 East, 426; *Rex v. Jones*, 3 Camp. 430; *Hart v. Mayor, etc.*, 9 Wend. 571; *People v. Cunningham*, 1 Denio, 524; *Knox v. Mayor, etc.*, 55 Barb. 405; 38 How. Pr. 67; *Doellner v. Tynan*, id. 176; *People v. Kerr*, 27 N. Y. 188; *Moore v. Jackson*, 2 Abb. [N. C.] 211; *Greene v. N. Y. C. & H. R. R. Co.*, 12 id. 124; *Tuttle v. Brush*, 50 Super. Ct. 464; *Bliss v. Johnson*, 94 N. Y. 235; *Hallock v. Baranski*, Daily Reg., Aug. 9, 1884; *Tiffany v. U. S. Illum. Co.*, id; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Clifford v. Dam*, 81 id. 56; *Bently v. Mayor, etc.*, 18 Abb. [N. C.] 123; *Elias v. Sutherland*, id. 126.) This being an action in equity in which no damages are sought, it was only necessary for plaintiffs to show that some injury was suffered by them which was not common to the general public; and it was not necessary to show the amount of such injury, as the action did not depend upon the amount. It was only necessary to show that the plaintiffs suffered material injury peculiar to themselves. (Wood on Nuis., §§ 777, 780. *Corning v. Troy I. & N. Factory*, 100 N. Y. 191, 205; *Jacques v. Nat. Exhib. Co.*, 15 Abb. [N. C.] 250; *People ex rel. v. Mayor, etc.*, 18 id. 123; *Elias v. Sutherland*, id. 126; *People ex rel. Mullin v. Porter, Com'r, etc.*, Daily Reg., April 15, 1887; *People ex*

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rel. *Hearn v. Squire*, id. March 12, 1885; *Ely v. Campbell*, 59 How. Pr. 333; *O'Reilly v. Mayor, etc.*, 3 Bosw. 484; *Davis v. Mayor, etc.*, 14 N. Y. 506; *Benjamin v. Storr*, L. R., 9 C. P. 400; *Doellner v. Tynan*, 38 How. Pr. 176.)

EARL, J. The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto. A reference to a few cases will show what courts have said upon this subject.

In *Rex v. Russell* (6 East 420) where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said "that it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature

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of the defendant's business were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot." In *Rex v. Cross* (3 Camp. 224), the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable yard * * * A stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another." In *Rex v. Jones* (3 Camp. 230), the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber yard, and if the street be too narrow he must move to a more convenient place for carrying on his business." In *Commonwealth v. Passmore* (1 S. & R. 217), the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city and suffering them to remain for the purpose of being sold there, so as to render the

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passage less convenient, although not entirely to obstruct it, and the court said: "It is true necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. * * * I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street because it saves the expense of storage. But there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit in proportion to the extent of their business." In the *People v. Cunningham* (1 Denio, 524) the defendants were indicted for obstructing one of the streets in the city of Brooklyn, and the court said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in *Russell's Case* (above cited). 'They must either enlarge their premises or remove their business to

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some more convenient spot.' Private interests must be made subservient to the general interest of the community." In *Welsh v. Wilson* (101 N. Y. 254), a case where the defendant obstructed a sidewalk in the city of New York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, we said: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Every one doing business along a street in a populous city must have such a right to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk." In *Mathews v. Kelsey* (58 Me. 56), the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."

Now what are the facts of this case? Both the plaintiffs and the defendant were extensive retail and wholesale grocers having stores near to each other on the south side of Vesey street in the city of New York; and a large portion of the plaintiffs' customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from the defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk and then a bridge made of two skids planked over so as to make a plank way three feet wide and fifteen feet long, with side pieces three and one-half inches high, was placed over the sidewalk with one end resting upon the stoop of the defendant's store and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and

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goods were conveyed over this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step upon the stoop and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position, when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of nine o'clock A. M., and five P. M., and that it obstructed the sidewalk the greater part of every business day. Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction of the sidewalk was no more and even less than it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place or enlarge his premises so as to accommodate it. It was incumbent upon the defendant to show, not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no one time obstructing the street for any considerable length of time. But there is no authority and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was, therefore, guilty of a public nuisance.

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But the defendant claims that the plaintiffs did not allege in their complaint nor prove such special damage as entitled them to maintain this action. It is the undoubted law that the plaintiffs could not maintain this action without alleging and proving that they sustained special damage from the nuisance, different from that sustained by the general public ; in other words, that the damage they sustained was not common to all the public living or doing business in Vesey street and having occasion to use the same.

The plaintiffs did not demand any damages in their complaint, and none were awarded to them by the judgment. They simply demanded an injunction restraining the nuisance, and such was the judgment given to them. The complaint sufficiently alleges the special damages. It sets forth the location of the stores of the parties on the same side of the street, near to each other, the character of the bridge, which, when in use by the defendant, was only thirty-five feet from plaintiffs' store, and the manner and extent of the obstruction upon the sidewalk. From these facts alone, as they are fully set forth, it clearly appears that the plaintiffs suffered damage from the nuisance, which was not common to other persons having occasion to use the street. But the complaint goes still further, and distinctly alleges that the obstruction prevents "the plaintiffs and their employes or patrons and all persons from passing along said sidewalk to and from Church street, and to and from plaintiffs' said store, to the detriment and great injury of plaintiffs and their said business ;" that the obstruction had been maintained for more than six months prior to the commencement of the action, on an average of five hours each day during the business hours of the day, "to the great and irreparable injury of the plaintiffs." While the complaint is not very definite as to the particular damages suffered by the plaintiffs and the extent thereof, there is enough to show that they suffered some special damage ; and if the defendant was not satisfied with the complaint in these respects, he should have moved to make it more definite, or for a bill of particulars. The defendant

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having taken issue upon the complaint, and gone to trial, it must be held sufficient to warrant the proof given.

The facts proved and found show special damage from the nuisance to the plaintiffs. There was some proof that some custom was turned from the plaintiffs' store on account of the obstruction, and that pedestrians were turned to the north side of the street before reaching plaintiffs' store. That the plaintiffs suffered some special damage not common to persons merely using the street for passage is too obvious for reasonable dispute. Direct proof of the damage was not needed. All the circumstances show it.

It is further objected, on the part of the defendant, that some of the material findings of fact made by the trial judge were not upheld by any evidence. A careful scrutiny of the evidence fails to satisfy us that this objection is well founded. On the contrary, the undisputed evidence showed the nuisance, the special damage and the right of the plaintiffs to a judgment restraining such nuisance. The evidence of the defendant was directed mainly to show that the bridge was necessary in his business; that skids and other similar appliances were in common use by merchants in the city, and that he left a passage-way for pedestrians on and over his stoop. The alleged necessity, as we have shown, furnished the defendant no justification for the nuisance, and it may be conceded that similar appliances are quite common in New York. It is not the nature of this appliance that furnishes the basis of our judgment, but its unreasonable use. The defendant could not justify his unreasonable obstruction of the sidewalk by showing that he allowed pedestrians to pass around or through his store or over his elevated stoop between moving barrels and packages. The stoop is no part of the sidewalk, and the defendant could not appropriate that to his private use and substitute his stoop for the public convenience. While temporarily obstructing the sidewalk, he should give pedestrians the best passage he can over his stoop. But this should be a temporary, not a permanent shift. He cannot justify the

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obstruction of the sidewalk for hours because he gives the public a less convenient passage over his stoop.

The trial judge refused to make any findings upon certain questions of fact submitted to him, and this is now complained of as error. It is the duty of the trial judge to find upon every material question of fact submitted to him and involved in the evidence. But his refusal to do so will not be an error fatal to his judgment if the findings asked were not material to the decision of the case, or would not be beneficial to the party asking them. Among the findings thus submitted on the part of the defendant were the following: "That the defendant uses the place complained of at a time and in a manner that is reasonable under all the circumstances;" "that the use of the sidewalk by the defendant does not unreasonably abridge or obstruct the passage of pedestrians." The judge should properly have found upon these questions; but upon the undisputed evidence he should have found against the defendant, and, therefore, he has suffered no harm from the neglect or refusal to find. The facts proved by uncontradicted evidence, and found, showed that the obstruction was unreasonable. If the trial judge had responded to these findings in favor of the defendant, and had yet rendered judgment against him, the judgment would still have been based upon sufficient facts and could not have been disturbed. The opinion and conclusion of the trial judge, notwithstanding the other facts found, that the obstruction caused by the defendant was not unreasonable, would not have been controlling and would not have sustained a judgment in favor of the defendant. Such a judgment would have been against the evidence.

But the judgment rendered is too broad and general in its terms. It is as follows: "That plaintiffs are entitled to an injunction perpetually restraining the defendant, his agents, servants or employes, from obstructing the southerly sidewalk of Vesey street, in front of the premises Nos. 35 and 37 Vesey street, by any plank-way or bridge or other like obstruction, elevated above the sidewalk, and reaching from said store, or

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from the stoop in front of said store to the roadway of said Vesey street, or from hindering or preventing the plaintiffs or their employes, servants and customers from having the free and unobstructed use of and passage along the sidewalk of said Vesey street in front of said premises, Nos. 35 and 37 Vesey street, by any like obstruction." The judgment entirely prevents the defendant from using the bridge or other like obstruction. We find nothing in the evidence which justifies this. We cannot perceive that the bridge is in any material degree a greater obstruction than skids would be if similarly used. The judgment should be so modified as to read as follows: "It is ordered and adjudged that the defendant, his agents, servants and employes refrain from unnecessarily or unreasonably obstructing the southerly sidewalk of Vesey street in front of the premises Nos. 35 and 37 Vesey street, by any plank-way or bridge or other like obstruction elevated above the sidewalk and reaching from said premises or from the stoop in front of the same to the roadway of said Vesey street, or from unnecessarily or unreasonably hindering or preventing the plaintiffs or their employes, servants and customers from having the convenient use of and passage along the sidewalk of said Vesey street in front of said premises Nos. 35 and 37 Vesey street, by any like obstruction; and it is further adjudged that the plaintiffs recover of the defendant \$164.20 costs of this action;" and, as so modified, it should be affirmed, without costs to either party in this court.

It is difficult to frame the judgment by the use of general language so as to protect and secure the rights of the parties. But the rules we have laid down in this opinion will probably be found sufficient as a guide if it should be necessary to enforce the judgment as modified, and therefrom the meaning and scope of the important words "unnecessarily" and "unreasonably" may, with sufficient accuracy, be ascertained.

All concur.

Judgment accordingly.

Statement of case.

107 374
117 680**JOSEPH H. BUSHBY, Respondent, v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.**

The duty owing by a master to his servant to furnish, with reasonable care, proper and adequate machinery or other appliances for his work, may not be evaded by a delegation thereof to another. Whoever does an act required by the rule by appointment or permission of the master represents him, and the act is his act.

Defendant delivered to one L. at a station on its road, a platform car with knowledge that it was to be used in the transportation of lumber over its road. Upon the sides of the platform of the car were iron sockets for stakes or standards, which were necessary in order to load the car. Stakes were not furnished, it being the practice of defendant to furnish lumber cars without stakes, which were supplied by the shippers. L. put a stake in each of the sockets and loaded the car with lumber under the direction of defendant's station agent. The car was attached to a freight train, upon which plaintiff was employed as a brakeman. In going around a curve, at a high rate of speed, one of the stakes broke, the lumber and plaintiff, who was upon it at the time in the discharge of his duty, were thrown off, and plaintiff was injured. In an action to recover damages for the injury, it appeared that the stake was made of soft, poor wood, and was decayed, spongy and unsound, which was apparent on inspection. It did not appear that defendant had made any rules or directions as to the inspection of such cars, and the station agent had simply general directions to see that everything was in order and to correct anything he saw out of the way; if the conductor or brakeman saw a defect they were to report it to the station agent. *Held*, that the stakes were necessary appliances forming part of the car, and defendant was chargeable with negligence in failing to exercise proper care that suitable and proper ones were furnished; also, that defendant's practice or custom was no defense, as it merely showed it had chosen to delegate to shippers a duty it should have performed itself; and that, therefore, defendant was liable.

(Argued October 20, 1887; decided November 29, 1887.)

APPEAL from order of the General Term of the Supreme Court in the fifth judicial department, made the first Tuesday of June, 1885, granting a motion for a new trial. (Reported below, 37 Hun, 104.)

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence.

The facts are sufficiently stated in the opinion.

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E. C. Sprague for appellant. Assuming that the stake in question was a machine or apparatus within the meaning of the said rule, if there was any negligence either of the shipper of the lumber, or on the part of the co-employees of the plaintiff, this action cannot be maintained for such negligence. The servants of the defendants, who were engaged in loading and inspecting this lumber, were co-employees of the plaintiff within the rule exempting the defendant from liability for their negligence. (*Brown v. R. R. Co.*, 29 Alb. Law Jour. 473; *Besel v. N. Y. C. R. R. Co.*, 70 N. Y. 171, 175; *Slater v. Jewett*, 85 id. 61; *Crispin v. Babbitt*, 81 id. 516; *Murphy v. R. R. Co.*, 88 id. 146; *Smith v. Pott*, 46 Mich. 258; *Gibson v. R. Co.*, 22 Hun, 289; *Scoville v. Erie R. Co.*, 3 N. Y. W. Dig. 114; *Mackin v. R. R. Co.*, 135 Mass. 210; *Seaver v. R. R. Co.*, 14 Gray, 466; *Hodgkin v. R. R. Co.*, 119 Mass. 419; *Brick v. R. R. Co.*, 98 N. Y. 211; *Powers v. R. R. Co.*, id. 274.)

A. Hadden for respondent. It was the duty of the defendant to furnish for the use of the plaintiff, its employe, necessary suitable and safe machinery and appliances for the business in which he was engaged, and in this case a car, not only fitted with necessary appliances, such as wheels, brakes, etc., but with safe, suitable and proper stakes, for the purpose of holding the load of timber, then being transported, in its place upon the car; and a failure to do so would render the defendant liable to damages for such negligence. (*Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 546, 547; *Flike v. B. & A. R. R. Co.*, 53 id. 553; *Lanning v. N. Y. C. & H. R. R. R. Co.*, 49 id. 532; *Sheehan v. N. Y., L. E. & W. R. Co.*, 91 id. 334; *Gottlieb v. N. Y., L. E. & W. R. Co.*, 29 Hun, 638; *Kain v. Smith*, 80 N. Y. 458; *Mann v. Pres., etc., D. & H. C. Co.*, 91 id. 496; *Abel v. Pres., etc., D. & H. C. Co.*, 103 id. 581.) It being the duty of the defendant to furnish the stakes as a necessary part of the equipment of the car, the act of furnishing them was that of the defendant, whoever did it was acting in the place of the defendant, and

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the defendant is liable in damages for the negligent acts of such person. (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 553; *Kane v. Smith*, 80 id. 459; 89 id. 379; *Cone v. D., L. & W. R. R. Co.*, 81 id. 208.) It was for the jury to say whether the defendant knew, or ought to have known of the defect in the stake, and whether the defendant had discharged its duty to the plaintiff in that respect. (*Creed v. Hartsman*, 29 N. Y. 591, 595; *Storrs v. Utica*, 17 id. 104, 107.) The defendant had control as to the manner of performing the work, which furnishes ground for holding it liable for the negligence of the party doing it. (*Parks v. M. & A. of New York*, 8 N. Y. 222, 227; *Kain v. Smith*, 80 id. 474; *Rose v. B. & A. R. R. Co.*, 58 id. 220.) Lewis, the party who staked up the car, was in no sense a co-employee of the plaintiff. His act was that of the defendant, and if the negligence of the defendant contributed to the injury, it is liable, notwithstanding the co-employees of the plaintiff may have been negligent in regard to the same matter. (*Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 540.) Humphrey was, in that respect, acting in the place of the defendant, and not as a co-employee of the plaintiff; and it should have been left to the jury to say whether he was negligent in allowing this car to be put in the train, loaded and staked in the manner it was, with those defective white-wood stakes. (*Durkin v. Sharp*, 88 N. Y. 225, 228; *Fuller v. Jewett*, 80 id. 46; *Kain v. Smith*, id. 468; *Mann v. Pres., etc.*, 91 id. 495; *Abel v. Pres., etc.*, 103 id. 581; *McCall v. Wetherby*, 21 W. D. 530.) The plaintiff had a right to assume that the defendant had exercised reasonable care in providing, loading, equipping and furnishing cars with suitable and necessary appliances for putting them in the train so as to expose him to no unusual and unnecessary hazard or danger in the performance of his duty. (*Connelly v. Poillion*, 41 Barb. 366; 41 N. Y. 619; *Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 548; *Kain v. Smith*, 89 id. 375.) It should have been submitted to the jury whether the defendant was negligent in not having made and promulgated rules in respect to the inspection of the cars

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that were to transport the lumber, the loading of the same, and the furnishing of stakes and other appliances. (*Rose v. B. & A. R. R. Co.*, 58 N. Y. 221; *Dana v. N. Y. C. & H. R. R. Co.*, 92 id. 639; *Abel v. Prest.*, etc., 103 id. 581.)

DANFORTH, J. The defendant, with knowledge that it was to be used for the carriage of lumber over its tracks and by its servants, delivered at its station in Webster, to one Lewis, a platform car. To the sills of this car on each side six permanent loops or iron pockets were securely bolted. These were purposed and intended for the reception of stakes or standards in order that so equipped, the car would be adapted for carrying a loose load such as lumber or the like. The stakes were not furnished with the car. Lewis had never before loaded a car. On this occasion he put a stake in each of four pockets on either side of the car and piled on and arranged the lumber under the direction of the defendant's station agent, who regulated the length of the stakes. The car was then added to a freight train on which the plaintiff was employed as brakeman, and in the performance of his duty he was necessarily upon the car while the train was going around a curve at a high rate of speed. At that moment one of the stakes broke and by reason thereof, he, without fault on his part, was thrown with the lumber upon the track and by the fall severely injured. Upon examination it was found that the stake in question was made "of very poor white wood, brash, brittle wood and partially decayed." "The outside was spongy like a cork where it had been shaved off with an axe." "It was a dead stick and had lost its strength and was punky." "It had broken off almost even with the top of the stake hole." It did not appear that the defendant had made any rules or directions as to the inspection of such cars, or that any agent of the company except as above mentioned superintended the putting in of the stakes. The station master testified that he had "no printed instructions in regard to loading the cars, or anything on that subject," or in regard to seeing how the stakes were,

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but only generally that he wanted to see that everything was in order; he had no special instructions. The defendant, however, relies upon its "system." That was to let the shipper load and stake, and as to inspection, the evidence relied upon in its behalf only tends to show that if, in the general performance of the duties of their employment, the station agent found anything out of the way, he should correct it, or if the conductor or brakeman saw a defect, he should report it to the station master. No special duty was imposed on either in regard to inspection, nor direction given as to its manner. Care in all matters was enjoined upon them as a part of a servant's duty to his employer; nothing more.

The defendant moved for a nonsuit upon the grounds that "no cause of action has been established by the evidence." "That no negligence on the part of the defendant has been established by the evidence such as would sustain the action." "That whatever negligence may have been shown, if any, in this case is the negligence of co-employees of the defendant for which the defendant is not responsible." "That the plaintiff's own negligence contributed to his injury in such a way as to defeat his right of action." The plaintiff asked to go to the jury upon the questions: (1.) Whether the company should not have made and promulgated rules in respect to the inspection of the cars that were to transport the lumber in regard to the stakes. (2.) Whether the company exercised due care in furnishing safe and suitable machinery, means and appliances for the running of this car. (3.) Whether the defendant was guilty of any negligence which contributed to the injury sustained by the plaintiff. (4.) Whether the plaintiff himself was guilty of any fault or negligence on his part which contributed to the injury. The court expressed the opinion that, whether the plaintiff was guilty of any negligence which contributed to the injury, would be a question for the jury if the case were submitted to them, but refused to submit any question to the jury and granted the motion for a nonsuit, and the plaintiff's counsel excepted. The exceptions were ordered to be heard at the General Term in the first instance. That

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court was of opinion that the case was one for a jury and directed a new trial. Against that decision the defendant appeals and makes the following points :

First. That "the stakes were not appliances or machinery within the rule which requires a master to furnish with reasonable care, proper and adequate machinery or other appliances for the proposed work," but on the contrary the defendant says they "were appliances furnished and employed by the shipper in loading the car with lumber to be transported by the defendant."

Personal negligence is the gist of the action, and the duties referred to in the rule cited are those of the master and he cannot evade the responsibilities incident thereto by delegation of them to another. Whoever does the act by his appointment or permission, represents, and, as to that act, is the master. To hold otherwise would exempt a corporation from all liability, and we must at the outset determine to which of the acts the one complained of belongs. Did the stakes form a part of the car, or were they an incident to the load? It was proven that the transportation of lumber was a considerable part of defendant's business. We may take notice of the fact that such freight is common to all railways. It is in evidence also that the stakes were necessary and usual in preparing for such a load. The car actually furnished indicated by the iron sockets where such stakes should be placed and were arranged and prepared for them. Had the car when sent to the shipper been equipped with stakes and so ready for use, I suppose no one would doubt that for any accident arising from the unfit material of which they were made, or from imperfect construction, the owner would be liable. If the iron socket had broken from a known defect in the iron, or from a known imperfect connection with the car, and the plaintiff from that cause received the injury from which he now suffers, or if the sill of the car to which the socket was fastened, had given way by reason of inherent weakness, the result would be the same. This consequence follows because experience has shown that owing to the rapid speed at which the train travels and the violent shocks to which a car is some-

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times exposed, every part of it must be made of great strength. This rule should apply to any appliance which is made part of the structure, and it can make no difference that it may be for an occasion rather than constant use. The question relates to the condition of the car when placed in the hands of the servant, and its delivery to him raises for his benefit the implication that the employer has used suitable care and foresight in adopting it as an instrument or means to carry on its business. Upon this he might rely as an assurance not only that the body of the car and its running gear were safe, but that the needed requirement for the reception of the load placed upon it was also fit for the purpose. The platform and the stakes constituted the bottom and the sides of the car and one was as much a part of it as the other.

Moreover, it was the duty of the defendant by virtue of the statute which created it and made it in many ways as the price of its existence, a public servant, not only to "take" the freight offered, and regulate "the time and manner" in which it should be transported, but also furnish sufficient accommodation for its transportation as well as for the transportation of passengers, and anticipating the variety of cars which that duty would require, the statute names not only passenger cars, baggage cars, freight cars, and merchandise cars, but also "lumber cars," *eo nomini* (§ 38, act of 1850, Chap. 140), and even points out the place they shall occupy in the making up of certain trains. This provision is also incorporated into the Penal Code (§ 422). The stakes pertained to the "manner" and were part of the accommodations furnished for transportation of the lumber—they were not part of the load, nor appurtenant thereto. They belonged to the car as a "lumber car." With stakes the car in question was fitted to carry lumber and was a lumber car; without stakes it was not. Of course the stakes served to secure or keep the load upon the car, but that would be through the construction of the car, and not through any application of the stakes to the load. The platform of the car prevented the lumber from falling through; the stakes of the car were

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designed to prevent it from falling off. The stakes were not a temporary expedient, as a rope binding the load or a block at the wheels of a carriage. To remove a load so bound the rope must be taken away, and if another load is put on it must be rebound, and so with the block. But the stakes, like the bottom or platform of the car, remain after the load is removed and the car, without alteration, remains ready to receive another load. The duty, therefore, was upon the master to fit or prepare the car for the use to which it was consigned, and no encouragement should be given to an omission to perform that duty, or to negligence or failure in any degree in respect to it. On the contrary, a just public policy, as well as that of the statute, requires a court to hold a railroad company to a strict observance of its obligation.

Second. The next proposition of the defendant is, that "it is not necessary in this case to decide whether the stakes in question were or were not appliances or machinery within the meaning of the rule invoked by the Supreme Court at General Term" (and to which I have above referred) "for the reason that the system under which they were furnished, inspected and employed was perfectly well known to the plaintiff, and he took the risks of the consequences of that system."

There was no system as to this matter. If the evidence shows that such practices had obtained before, it merely shows that the defendant chose to delegate a duty to the shipper which the corporation should have performed. It is equally responsible for his negligence; his negligence is its negligence. (*Durkin v. Sharp*, 88 N. Y. 225.)

Third. But the defendant says: "Assuming that the stake in question was a machine or apparatus within the meaning of the said rule, if there was any negligence in respect thereto it was the negligence either of the shipper of the lumber, or on the part of the co-employees of the plaintiff, and this action cannot be maintained for such negligence."

If I am right in the views already expressed, the negligence was corporate negligence, in the performance of a duty which it could delegate only at its own peril.

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The points of the appellant state that, by the system employed, the loading was to be done by the shipper. It is unnecessary to say what the defendant's case would be if the defect complained of had been in that act. It was not. It was in preparing the car to receive and hold the load. The load might have been removed altogether without remedying the defect, or mathematically adjusted in its bearings without preventing the consequences for which compensation is now asked. The defect was in the car as a "lumber car."

Fourth. So far as the remaining point made against the judgment denies negligence in respect to the quality of the stakes, it is sufficient to refer to the evidence above recited, and to which there was no answer or contradiction, to show that wood was used in their formation, which in its best condition was soft and feeble, and which, in fact, was unsound and decayed, and this was obvious to any one upon inspection. But it is also said that, "under the system adopted, the only possible negligence for which the defendant could be responsible was in the inspection; and it is submitted that the jury should not have been permitted to find negligence in inspection as an affirmative fact upon the uncorroborated statement of the witness Eygabroat."

This witness was an employe of the defendant and on its train. He saw the accident, the timber falling from the train, and the plaintiff falling with it. The train was stopped, the plaintiff picked up and the stake examined. He says "I observed that one of the stakes was broken. It was of very poor white wood, brash, brittle wood, and partially decayed. It was broken off about even with the top of the stake hole. * * * The end that was broken off looked to me like a stake that had been cut out of a dead tree, and it looked as if it was dozy and partially decayed. The outside of it was spongy and like a cork where it had been shaved off with an axe." There is other evidence to the same effect coming from the defendant's employes called by the plaintiff, as well as other persons, and no witness called by the defendant, nor contradiction of plaintiff's witnesses at any point. There

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was a large amount of testimony for the jury. There were no rules of the company requiring inspection, nor was there any but casual inspection given by the station agent, according to his custom, of the stakes and load, and by others to see if the load was rightly placed. As to these persons the question would not be whether they believed the stake sound, but whether they were justified in so believing. But the main question was whether the corporation, by any of its agents, failed to exercise due care to prevent injury to the plaintiff from defects in the car furnished for his use. The rule as to its duty was again formulated in *Abel v. President, etc., Delaware and Hudson Canal Company* (103 N. Y. 581) where the court said, in substance, that "the law imposes upon a railroad company the duty to its employes of diligence and care, not only in furnishing proper and reasonably safe appliances and machinery, and skillful and careful co-employes, but also of making and promulgating rules, which, if faithfully observed will give reasonable protection to the employes."

Under each branch of this rule, then, there was a question for the jury in this case, and the General Term committed no error in reversing the decision of the trial judge and granting a new trial. As the appeal of the defendant has prevented that the order of the General Term should be affirmed, and in pursuance of the stipulation which made the appeal possible, the plaintiff must have judgment absolute in his favor.

The order appealed from is therefore affirmed, and judgment absolute ordered for the plaintiff, with costs in all courts.

All concur.

Ordered affirmed, and judgment accordingly.

Statement of case.

LUELLA S. ROOT, Respondent, v. HARRIET E. WADHAMS,
Appellant.

A. owned a lot of land, upon which was a spring of water; he gave to B., the owner of an adjoining lot, in consideration of a small annual rent, a parol license, revocable at his pleasure, to lay a pipe underground from the spring to conduct the water therefrom to the house of the latter. B. laid the pipe to his house where it discharged into an open tub. C. owned a lot, separated about fourteen rods from that of A., the lot of B. intervening. With the consent of A. and B., C. laid a pipe from his house to the tub on the premises of B. and thus took the surplus water therefrom for the use of his house. A. thereafter purchased C.'s lot, and his tenant, by his direction, connected the two pipes at the tub, which was thereafter supplied by a branch pipe. A. sold and conveyed the C. lot "with the appurtenances thereto belonging;" the deed making no mention of the spring or of the water therefrom. Through various means conveyances, containing similar descriptions, plaintiff acquired title to said lot. A. continued to own the lot upon which was the spring until his death; his executors thereafter sold and conveyed the same to defendant by deed, describing it by metes and bounds, and containing no reservation or mention of any right in any other person to the spring or the water from the spring. Defendant, after the conveyance to her, disconnected the pipe from the spring. In an action to restrain such interference with the flow of water through the pipe and to enforce plaintiff's alleged right to a supply of water from the spring, it appeared that, when defendant was negotiating for the purchase, R., who then owned plaintiff's lot, informed defendant that no person, other than the executors, owned any right in or to the waters of the spring or to take water therefrom, and she relied on such statement in making the purchase. The trial court found that the water from the spring was necessary for the use and enjoyment of plaintiff's premises, and with it they were of much more value than without, but that the premises could have been supplied with water by means of a well on the premises; defendant offered to show on the trial that such a well could have been dug at a small cost. *Held*, that the action was not maintainable; that the right to the use of the water did not pass as an appurtenance under the deed from A. of the plaintiff's lot; and that there was no implied easement giving such a right.

By the word "appurtenance" nothing passes except such incorporeal easements, rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted; a mere convenience is not sufficient to create such a right or easement.

Lampman v. Milks (21 N. Y. 505); *Curtiss v. Ayrault* (47 N. Y. 73) distinguished.

Root v. Wadhams (85 Hun, 57) reversed.

(Argued October 20, 1887, decided November 29, 1887.)

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132	438
107	384
134	389

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 13, 1885, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. (Reported below, 35 Hun, 57.)

This action was brought to restrain the defendant from removing or interfering with a pipe which formerly conducted water from a spring on defendant's premises, across an intervening lot to the premises of plaintiff, and from in any manner interfering with the flow of water through said pipe.

The material facts are stated in the opinion.

George W. Ray for appellant. The conveyance by Andrew Bradbury to Martin M. Rowley did not create or grant any right or easement in the spring, or in the waters of the same, or for a supply of plaintiff's premises with water from the said spring. (*Greene v. Collins*, 86 N. Y. 246; 20 Hun, 474; *Adams v. Conover*, 87 N. Y. 422; *Brace v. Yale*, 4 Allen, 393; *Philbrick v. Ewing*, 97 Mass. 133; 3 Willard on R. Prop. 514, § 4; Washb. Easements and Serv. 52; id. 41, § 21; *Wiseman v. Lucksinger* 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 id. 323; *King v. Mayor, etc.*, 102 id. 171.) Such a right, or easement, cannot be created, or granted by implication, unless the right claimed to be granted or conveyed as appurtenant exists in fact as a matter of legal right. (*Greene v. Collins*, 86 N. Y. 246, 252; *Adams v. Conover*, 87 id. 422; *King v. Mayor, etc.*, 102 id. 176; Willard on R. E. 514; § 4; *Parsons v. Johnson*, 68 N. Y. 68.) A parol license is not the subject of a grant nor can it be an appurtenant to land. It is not an easement in land, nor can it ripen into an easement. (2 Wash. R. Prop. 303; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 id. 323; 3 R. S. [5th ed.] 2195, § 140; *Greene v. Collins*, 86 N. Y. 246.) This parol license to lay pipe, etc., given by the intervening owner, was not an easement; nor was the parol license given by Bradbury. (*Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 id. 323.) A parol license is not

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assignable. (*Wolf v. Frost*, 4 Sandf. Ch. 72; *Mumford v. Whitney*, 15 Wend. 380; *In re Coburn*, 1 Cow. 568; Washb. Easements and Serv. [2d ed.] 6.) Any conveyance by Bradbury of the license and privilege he enjoyed revoked it *ipso facto*. (*Jackson v. Babcock*, 4 Johns. 419; *Huntington v. Asher*, 96 N. Y. 612; Washb. Easements and Serv. [2d ed.] 6, 7; *Selden v. D. & H. C. Co.*, 29 N. Y. 634; 3 Kent's Com. 452; *Greene v. Collins*, 86 N. Y. 246; *Adams v. Conover*, 87 id. 422; *Wiseman v. Lucksinger*, 84 id. 31; *Cronkhite v. Cronkhite*, 94 id. 323.) These conveyances by these intervening owners operated to revoke the licenses given, and each license disappeared by the conveyance by the grantor respectively. (*Winne v. Ulster County Savings Inst.*, 37 Hun, 349.) An easement is a permanent interest in another's land, with a right to enter at all times and enjoy it. (3 Kent, 452; *Huntington v. Asher*, 96 N. Y. 612.) No easement by implication was created therein. (*Brace v. Yale*, 86 Mass. [4 Allen], 393; *Philbrick v. Ewing*, 97 Mass. 133; *Ferrin v. Garfield*, 37 Vt. 312; *Green v. Collins*, 86 N. Y. 253; *Voorhees v. Burchard*, 55 id. 98.) An easement by implication arises only "when the owner of an entire tenement separates the same, or where the owner of two or more adjacent tenements conveys one with a continuous apparent easement running through the whole." (*Parsons v. Johnson*, 68 N. Y. 68; Wharton's Law Lexicon; title "easements"; 2 Washb. on R. Prop. 317; Bouvier's L. Dict. 515; *Lampman v. Milks*, 21 N. Y. 505; *Butterworth v. Crawford*, 46 id. 349, 352; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Simons v. Cloonan*, 47 N. Y. 3; 81 id. 557; *Robbins v. Barnes*, Hob. 731.) Bradbury's attempt to convey or transfer such a license revoked it. (*Jackson v. Babcock*, 4 John. 419; *Huntington v. Asher*, 96 N. Y. 612; *Cronkhite v. Cronkhite*, 94 id. 323; *Wiseman v. Lucksinger*, 84 id. 31; 3 Kent's Com. [12th ed.] 453; *Wolf v. Frost*, 4 Sandf. Ch. 72; *Mumford v. Whitney*, 15 Wend. 380; *In re Coburn*, 1 Cow. 568.) The easement claimed by implication must be open and apparent. (*Butterworth v. Crawford*, 46 N. Y. 349.)

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Still it does not pass unless it exists as matter of legal right. (*Butterworth v. Crawford*, 46 N. Y. 349.) Rowley's knowledge when he took his deed, that his grantor did not own the right to supply the premises with water in any way or manner; that he did not own the right to carry or conduct the water over, through or across the intervening premises in any way or manner and that he did not own the pipes or any right to lay or continue them, defeats the implication of a grant or conveyance of any such right or easement. (*Simons v. Cloonan*, 47 N. Y. 3; 2 *Lansing*, 346; *Curtiss v. Ayrault*, 47 N. Y. 73; *Moak's Underhill on Torts*, 431, 432.) The plaintiff is estopped from asserting any easement or right in the spring or in the waters thereof. (*De Herques v. Marti*, 85 N. Y. 609; *Oreque v. Sears*, 17 Hun, 123; *Blair v. Wait*, 69 N. Y. 133; *Nicoll v. Burke*, 45 Super. Ct. 129; *Wendell v. Van Rensselaer*, 1 John. Ch. 344; *Storrs v. Barber*, 6 id. 166; *Tilton v. Nelson*, 27 Barb. 595.) The defendant is not estopped from asserting that a water right as claimed, or any water right, does not exist; that plaintiff owns no interest in the spring or its waters, or to be supplied with water from the spring through the pipes in question. (*Butterworth v. Crawford*, 46 N. Y. 352.) The easement claimed not being necessary for the enjoyment of the plaintiff's premises, the broad doctrine of easement by implication will not then be applied. (*Green v. Collins*, 86 N. Y. 253; *Tabor v. Bradley*, 18 id. 112; *Johnson v. Jordan*, 2 Metc. 237; *Ogden v. Jennings*, 62 N. Y. 526, 531; *Griffiths v. Morrison*, 36 Hun, 337.)

Albert F. Gladding for respondent. Where the owner of an estate conveys a portion thereof, or the owner of two estates conveys one of them, the purchaser takes it with all the incidents and appurtenances which, at the time, appear to belong to it as between it and the portion retained. (*Simons v. Cloonan*, 81 N. Y. 557; *Lampman v. Milks*, 21 id. 505; *Outerbridge v. Phelps*, 58 How. Pr. 77; *Green v. Collins*, 86 N. Y. 246; *Adams v. Conover*, 87 id. 422; Esek Cowen's criticism of last two cases, 25 Alb. L. J. 279; 26 id. 224-245.)

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The fact that the plaintiff's and defendant's premises were separated by intervening lands at the time of Bradbury's conveyance to plaintiff's grantor does not change the effect of that conveyance, in creating and passing the easement and right to the water as it was then being used, in favor of the plaintiff's premises as the dominant tenement, and against Bradbury's remaining estate (now defendant's) as the servient tenement. (*Philbrick v. Ewing*, 97 Mass. 133; *Farmer v. Ukiah Water Co.*, 36 Cal. 11; *Leonard v. Leonard*, 84 Mass. 543; *Seymour v. Lewis*, 13 N. J. Eq. 239; *Baker v. Beasey*, 74 Me. 472; *Gilbert v. Petiler*, 38 Barb. 488; 38 N. Y. 165; *Browner v. Jones*, 23 Barb. 153; *Dyer v. Sanford*, 50 Mass. 395, 405; *Leonard v. Leonard*, 89 id. 277; *Elliott v. Sallu*, 14 Ohio, 10; *French v. Morris*, 101 Mass. 68; *Owen v. Fields*, 102 id. 90; *Lattimer v. Lattimer*, 72 N. Y. 174; *Trustees, etc. v. Lynch*, 70 id. 440; *Bloomfield v. Ketchum*, 25 Hun, 218; *Hamil v. Griffith*, 40 How. Pr. 305; *Greene v. N. Y. C. & H. R. R. Co.*, 65 id. 154; *Foster v. Buffalo*, 64 id. 127; Washb. on Easms. 12, 13, 75, 96; *Curtiss v. Ayrault*, 47 N. Y. 73; *Hills v. Miller*, 3 Paige, 254; 2 Washb. on R. Prop. 316, 317; *Roberts v. Roberts*, 55 N. Y. 275; *Flint v. Bacon*, 13 Hun, 454.) All easements must be created by grant. (Goddard on Easement's, 4, 23, 80, 83.) It is no objection to the enforcement of a contract by one party against another, that some third person stands in a situation to prevent (if he pleases to interfere), the one party from realizing the benefits of his contract. (*Green v. Collins*, 86 N. Y. 250; *Leonard v. Leonard*, 84 Mass. 543; *Huttemier v. Albro*, 18 N. Y. 48.) An easement created by reservation in favor of the grantor is upheld as a grant of the same from the grantee, and may be created independent of the ownership of any estate to which it was appurtenant, or with which it was to be used and in favor of the grantor, his heirs and assigns. (Washb. on Easmts. 11, 12; Goddard on Easmts. 100; *Goodrich v. Burbank*, 94 Mass. 459.) When Bradbury conveyed his lower estate to plaintiff's grantor, he had the power to convey by express words, appropriate words therefor in the deed, the right to the

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waters of this spring as they were then being openly and visibly used by the lower tenement. (*Trustees v. Lynch*, 70 N. Y. 440; *Bloomfield v. Ketchum*, 25 Hun, 218.) If he had the power to convey this easement, then he did convey it, it being at the time an apparent appurtenant, in actual use and necessary to the full enjoyment of the estate conveyed. (*Philbrick v. Ewing*, 97 Mass. 133.) When Bradbury conveyed his lower estate to plaintiff's grantor, he not only had the power to convey the right to the water from the spring from his remaining land, but that right was an apparent easement attached to the premises conveyed, and practically annexed thereto by the continuous pipe from the spring to the dwelling. (Goddard on Easem. 87, 88; Washb. on Easem. 75-79; *Jackson v. Stevens*, 16 Johns. 110; *Jackson v. Bull*, 1 Johns. Cas. 90; *Jackson v. Wheeler*, 10 Johns. 164; *Jackson v. Demont*, 9 id. 55; *Trustees v. Lynch*, 70 N. Y. 450.) Bradbury and his grantee, the defendant, are estopped from claiming that he had no right to convey the water across the intervening lands. (*Leonard v. Leonard*, 84 N. Y. 543; *Greene v. Collins*, 86 Mass. 246; *Huttemeir v. Albro*, 18 N. Y. 48; *McCarty v. Leggett*, 3 Hill. 134; *Abbott v. Allen*, 14 Johns. 248; *Greenley v. Wilcox*, 2 id. 1; *Hamilton v. Wilson*, 4 id. 72; *Sinclair v. Jackson*, 8 Cow., 553; *Jackson v. Bull*, 1 Johns. Cas. 90; *Jackson v. Stevens*, 16 John. 110; *Dezell v. Odell*, 3 Hill, 215.) The defendant is estopped by her conduct from claiming, as against the plaintiff, that the right to the water from this spring did not belong to the plaintiff's premises at the time the plaintiff purchased and received her conveyance, as an easement attached thereto, and which would pass by a conveyance of the same. (*McNeil v. Tenth Nat. Bk.*, 46 N. Y. 325.) The plaintiff and her grantors had acquired the right by prescription to conduct the water across the intervening lands for the use of her premises. (*Nichols v. Wentworth*, 100 N. Y. 455; *Murchie v. Gates* [Me. Sup. Ct.], 34 Alb. L. J. 130; *Leonard v. Leonard*, 84 Mass. 543.) The prior owners of plaintiff's premises having been granted the privilege and license by the owners of the intervening prem-

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ises to lay the pipe from plaintiff's dwelling to the dwelling upon the intervening premises, and having expended money on putting in such pipe and the fixtures connected therewith upon plaintiff's premises, constituting improvements of a permanent character, such license became irrevocable in favor of plaintiff's premises and attached to the same. (*P. Gas Co. v. Cit. Gas. Co.*, 89 N. Y., 493; *Wiseman v. Lucksinger*, 84 id. 31-34; Washb. on E., 8, 23, 24, 379, 389; *Wickersham v. Orr*, 9 Ia. 253; *Snowdon v. Wilass*, 19 Ind. 10; *Winter v. Brockwell*, 8 East, 208.) Bradbury having originally consented that Rowley might take the water from his spring by making the connection of the pipes upon the intervening premises, he cannot revoke such license. (Washb. on E., 652, 653; *Curtiss v. Noonan*, 92 Mass. 406.) The plaintiff is not estopped from asserting her right to the water from the spring by anything that Rowley may have said to the defendant's husband before her purchase. (*Maguire v. Selden*, 100 N. Y. 612; *Andrews v. Aetna Ins. Co.*, 85 id. 334, 335; *Jewett v. Miller*, 10 id. 402; *Chaut. Bk. v. White*, 6 id. 236, 249; *Winegar v. Fowler*, 82 id. 315; *Maloney v. Horan*, 12 Abb. Pr. [N. S.] 289; *McCulloch v. Wellington*, 21 Hun, 5; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. 28; *Spencer v. Carr*, 45 N. Y. 406; *Lefever v. Lefever*, 30 id. 27; *Grant v. Va. C. & I. Co.*, 3 Otto, 335; *Brewster v. Striker*, 2 N. Y. 19.) A party setting up an equitable estoppel is himself bound to the exercise of good faith, and must act promptly in the exercise of the rights he claims under it, or the estoppel will be deemed to have been waived and the matter set at large. (*Andrews v. Aetna Ins. Co.*, 85 N. Y. 343; Bigelow on Estop. 293.) It is not necessary that an apparent easement, which is created by a grantor upon the conveyance of the dominant estate, should be one of absolute necessity; it is sufficient if full enjoyment cannot be had without it, (*Simons v. Cloonan*, 81 N. Y. 557.) Plaintiff's grant could not be contradicted or limited in its legal effect by parol statements made to some previous owner of her premises. (*Greene v. Collins*, 86 N. Y. 246, 254. *Mott v. Palmer*, 1 id. 564, 574.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. This is an appeal by the defendant from a judgment of the General Term affirming a judgment in favor of the plaintiff entered upon the decision of the trial judge at circuit without a jury.

Among the facts found are the following: On the 10th of March, 1865, one Bradbury took a conveyance of the premises now occupied by the plaintiff, and in June, 1870, he conveyed those premises to one Rowley, who, in February, 1883, conveyed them to the plaintiff. Bradbury had also been the owner and in possession of the premises now occupied by the defendant for thirty years prior to April 5, 1882, at which time he died, and on the 3d of July, 1882, the defendant took title to these premises from the executors of Bradbury who had power to sell. Thus, from 1865 to 1870, Bradbury was the owner both of the premises occupied by the plaintiff and of those occupied by the defendant. In 1860 one Aldrich Windsor conveyed to one Beebe a strip of land situated between the two above-mentioned lots, and such intervening strip was, at all points between the other two lots, at least fourteen rods wide. So that at the time when Bradbury was the owner of the premises now owned by the plaintiff and defendant, respectively, those lands were, and at all times for the past thirty years had been, entirely disconnected and separated from each other by this intervening lot. In December, 1861, Beebe conveyed the intervening lot to one Trask, who, in 1868, conveyed it to one Clark, who, in 1870, conveyed it to one Root, who has since that time been and now is the owner thereof.

The title, it will be observed, to the plaintiff's and defendant's premises, respectively, came to Bradbury from entirely different sources, and while Bradbury parted with the title to the premises now owned and occupied by the plaintiff in June, 1870, he continued to hold and own the premises now occupied by the defendant up to the time of his death, in 1882. The premises owned and occupied by the plaintiff are described in the various conveyances through which she claims title, by metes and bounds, "with the appurtenances thereto belong-

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ing;" and no conveyance makes any mention of any further or greater rights, "or of any water rights, spring, or the right to take water from any spring, or from the spring hereinafter mentioned." The title of the defendant was from the executors of Bradbury, and by a good and sufficient deed describing the lands and premises by metes and bounds, and containing no limitation or reservation whatever, "nor any mention of any right in any other person to any spring or to the water from the same, in whole or in part, or to the use of the same, which might be on the said premises."

On the premises owned and occupied by the defendant, there is, and has been for many years, a living spring of water, and some time, about 1860 or 1861, while Beebe was the owner and in possession of the intervening premises, fourteen rods wide, as above mentioned, he was desirous of obtaining a supply of water from the spring situated on the defendant's land, then owned by Bradbury, and for that purpose he applied to Bradbury to purchase from him the right to lay a pipe under the ground from the spring to Beebe's house, upon the intervening land, and to take the water from the spring through the same. Bradbury refused to sell or convey to him any such right, or any right to lay a pipe or take water from the spring, but he gave Beebe a parol license to lay a pipe from the spring to his house, and conduct the water thereto, at the same time informing Beebe that he should make a small charge therefor as the consideration for such privilege in the way of an annual rent. Under this license Beebe put the pipe from the spring, under ground, to his house, where it discharged water into an open tub, and where the pipe terminated. When the subsequent owners of the same premises, then owned by Beebe, respectively, came into the possession of the same under their purchases, Bradbury informed each of them that he should charge rent for the water from the spring, and in this they all acquiesced.

After Beebe put this pipe down, and some time after April, 1860, one Merchant, who was then the owner of the premises now occupied by the plaintiff, with the consent of Bradbury,

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and also with the consent of Beebe, the owner of the intervening land, laid a pipe from his (Merchant's) house on his premises, under ground, to the tub on the premises of Beebe, and took the surplus water from the tub through the pipe for the use of his house. His right to lay this pipe and take the water also rested in a parol license only. Bradbury never conveyed to Beebe, or to any of his successors, any right or privilege to take the water from the spring, or to lay the pipe under the ground, excepting in the manner already stated.

In 1865, Rowley was living on the premises now owned by the plaintiff, as tenant of Bradbury, and with the knowledge and by the direction of Bradbury, he connected the pipe running from the spring to Beebe's house on the intervening premises with the pipe running from the house on the premises on which he was then living and made one continuous line, a small branch pipe being attached to discharge the water into the tub at the Beebe house. Bradbury did not own the pipe leading from the spring to Beebe's premises, but it was laid and owned by Beebe. In June, 1870, when Bradbury conveyed the premises now owned by the plaintiff to the said Rowley, the water from the spring on Bradbury's premises now occupied by the defendant was running through a pipe and discharging into a tub on the premises now owned by the plaintiff, in the manner above described, and the learned judge in his findings adds: "That it was necessary for the use and enjoyment of such premises; and with such water running the plaintiff's premises were of much more value than they would be without it." This finding as to the necessity of the water for the use and enjoyment of the premises is limited by the further finding in which the learned judge says that the premises could have been supplied with water by means of a well dug on the premises. The defendant also offered to show such well could be dug for \$25, which would furnish a constant supply of good water, but under objection the evidence was excluded. While Rowley was the owner of the premises now owned by the plaintiff, he informed the defendant, who was about purchasing the premises now owned by her from the executors

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of Bradbury that no person other than the intended grantors owned the said spring, or any right in or to the waters of the same, or the right to take water from it, and she relied on such statement in making the purchase. Subsequently, the defendant disconnected the pipe from the spring on her premises, and this action was brought by the plaintiff to enjoin the defendant from such action and to enforce her right to a supply of water from the said spring.

Upon these facts the court granted the injunction and gave judgment for the plaintiff. She bases her right of action in this case upon two propositions, first, that the right to the use of this water passed to her by the deeds from Bradbury to Rowley, and from Rowley to her, as an appurtenance to the premises, and, second, that under the circumstances there was an implied easement consisting of the right to take water through or over the lands now owned by the defendant, so long as the parties owning intervening lands did not object to its passage across such lands in order to reach the lands now owned by the plaintiff.

We think no such right passed by the several conveyances to plaintiff and her grantors, which simply conveyed the land by metes and bounds "with the appurtenances thereunto belonging." Nothing passes by the word appurtenance except such incorporeal easements or rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere convenience is not sufficient to thus create such a right or easement. (See *Ogden v. Jennings*, 62 N. Y. 526; *Green v. Collins*, 86 id. 246; *Griffiths v. Morrison*, 106 id. 165.)

Nor do we think that under the circumstances there was any implied easement which passed to the grantees under the deed from Bradbury.

It must be remembered that the two premises, although at one time both owned by Bradbury, were essentially two distinct plots of ground, and the title to each vested in Bradbury from a different source. Between the two lots of ground was this intervening strip of fourteen rods in width, substan-

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tially and physically separating the premises and making two separate and distinct lots. It must also be remembered that the spring existing on the land now owned by the defendant was owned by Bradbury long anterior to the time when he became the owner of the premises now owned by the plaintiff, and that before that time, and while the intervening lot was owned by one Beebe, permission had been obtained by Beebe from Bradbury to take the waters from the spring across Bradbury's land to the lands now owned and occupied by Beebe, and that Bradbury had distinctly refused to grant him any permanent right, having given him simply a parol license to take it during his pleasure only, and in consideration of a small annual rent.

This state of things existed at the time Merchant, who occupied at one time the land now owned by the plaintiff, was permitted to take the surplus water from the intervening lots and conduct it to his own premises; and that was done by the mere parol license of Beebe and Bradbury. The same state of things existed at the time Rowley succeeded Merchant as tenant to Bradbury, and subsequently as Bradbury's grantee, Rowley at all times understood perfectly well the terms upon which his right existed to conduct the water over Bradbury's premises to his own, and he understood that it rested simply upon the parol license of Bradbury. All the facts show conclusively that Bradbury understood his own rights in the premises and never intended that any right to obtain the water from the spring on the premises now occupied by the defendant should accrue to the owners or occupiers either of the intervening lot or of the premises now occupied by the plaintiff. We see nothing in the facts found by the learned trial judge which would change the right to use the water from a right resting simply in a parol license, to an absolute right based upon an easement implied in a grant of the premises to plaintiff and her grantors.

We do not think the case comes within the principle of those cases cited by the counsel for the plaintiff, of which *Lamp-*

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man v. Milks (21 N. Y. 505), and *Curtiss v. Ayrault* (47 id. 73) are examples. In *Lampman v. Milks* the original owner of the land across which a stream flowed, diverted the stream through an artificial channel so as to relieve a portion of the land formerly overflowed by the stream, and that portion of the land he afterwards conveyed to a third party. The court held that neither he nor his grantees of the residue of the land could return the stream to its ancient bed to the damage of the first grantee. That is an entirely different case from the one at bar. The land which the owner conveyed after he had diverted the channel of the stream would have become worthless by being overflowed if he or his grantees of the remaining portion had been permitted to return the stream to its original channel. The court held that under such circumstances the owner in conveying the premises, thus relieved from overflow, charged the remaining portion of the premises with the servitude of submitting to the stream running through their lands. In the course of the opinion in that case the learned judge distinguished between those easements which are continuous, that is, self-perpetuating, independent of human intervention, and those which are termed discontinuous easements, the enjoyment of which can be had only by the interference of man, such as rights of way or a right to draw water. In regard to such latter kind of easements, upon a severance of tenements by the owner, they only pass which are absolutely necessary to the enjoyment of the property conveyed. In *Curtiss v. Ayrault* the same general doctrine is held. In that case it appeared that a marsh had been drained by the owner of the whole tract by digging a ditch which carried the water to other portions of the tract where it made a permanent channel in which the water, gathered in the marsh, flowed in a continuous stream, thus mutually benefiting the lands drained and the lands through which a supply of good water was thereby conveyed. The owner of the property, while these reciprocal benefits and burdens were in existence and apparent, divided the tract into parcels and conveyed the parcels to different grantees who contracted with reference to the then open

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and apparent condition of the land, and it was held that such condition was essential to the enjoyment of all the lands, and especially to that portion which, by the digging of the ditch, had been drained and made good available land.

To the same effect is *Adams v. Conover* (87 N. Y. 422), although that case arose under an alleged breach of covenant of warranty and of quiet enjoyment contained in the deed. It was contended that the covenant was broken because at the time of the conveyance of the premises, which consisted of a mill, a dam and a pond which furnished water power for the mill, they were in a certain visible condition in regard to the height of the dam, and yet a right existed in and was subsequently exercised by a third party to compel the lowering of such dam, the effect being to substantially ruin the premises for use as a water power, which was the sole consideration for their purchase and their chief value. The court held that the conveyance by metes and bounds, which included the dam and water power, conveyed the dam as it then stood at its existing and apparent height. The court said that the power of the water thus created and stored was the essential and material element of value in the mill property which was the subject of the conveyance, and, therefore, there was a breach of the covenant of warranty and of quiet enjoyment when it was shown that there was a superior right in a third person to demand a reduction of the height of the dam and the lessening of the head of water thereby, and it was so determined because of the fact that substantially the whole value of the property depended upon continuing the height of the dam as it existed, openly and apparently, at the time of the conveyance. We have carefully looked through the cases cited in the opinion of the learned justice who wrote at General Term, but we can find nothing in them that militates against the views here expressed.

Upon all the facts in this case we are of opinion that there was nothing but a mere parol license proved from the grantor of the defendant, and that the right to take or convey water from the defendant's premises did not pass to the plaintiff

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by the use of the word appurtenance in any of the deeds to her or her grantors, nor did such a right pass as an easement by implication.

The judgments of the General Term and of the Circuit should therefore be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgments reversed.

MARY C. FARGIS, Appellant, v. WILLIAM T. WALTON et al.,
Respondents.

Plaintiff leased of defendant W. rooms on the second floor of a building in the city of New York, the lower story of which was occupied as a store. W. was also the owner of four adjoining buildings, the lower stories of which were occupied as stores and the upper by tenants occupying apartments. W., desiring to make certain alterations and improvements in his stores, procured the plaintiff and other tenants occupying rooms over the stores under separate leases, to sign an instrument, not under seal, whereby for an expressed consideration of one dollar, the receipt whereof they acknowledged, they agreed to permit W. to make any alterations he might "deem necessary to carry out the plans and specifications in changing the house." No consideration was, in fact, paid. In an action to recover damages for alleged trespasses, in which the acts complained of were claimed by defendants to have been done in the making of the alterations referred to, plaintiff was nonsuited. *Held*, that the instrument was not valid as an agreement; that not being under seal it was not entitled to the common law or statutory presumption of consideration, and it being shown there was no consideration in fact paid, there was no presumption of an agreement to pay the consideration expressed; that in any event such an inference could only be drawn by the jury, not by the court; that considering the instrument as a license, it was not conclusive and binding against plaintiff as evidence, but could be explained, varied or contradicted by oral evidence, and could be revoked before it was acted upon; and evidence having been given by plaintiff that the license actually given and intended to be given related only to certain alterations which were completed before the commission of the trespasses complained of, also, that the license was revoked before acted upon, the ruling was error.

Oakley v. Boorman (21 Wend. 588); *Childs v. Barnum* (11 Barb. 14) distinguished.

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Where it is shown that the consideration expressed in an instrument under seal, was not actually given or promised, and a party was some other consideration, it is incumbent upon him to show that. It seems that courts are quite disinclined, by the application of the doctrine relating to *estoppel in pais*, to give to mere licenses, based on consideration, the force and effect of absolute agreements, and to be quite peculiar and exceptional which will authorize a party to proceed under his license after its revocation.

Fargis v. Walton (19 J. & S. 32) reversed.

(Argued October 21, 1887: decided November 29, 1887.)

APPEAL from judgment of the General Term of the Court of the city of New York, entered upon an order on the first Monday of December, 1884, which affirmed the judgment in favor of defendants, entered upon a verdict by the court. (Reported below, 19 J. & S. 32.)

The nature of the action and the material facts are stated in the opinion.

Samuel Jones for appellant. Having obtained the signature to the instrument upon statements of certain facts which limited its operation to certain alterations, it cannot now extend it beyond those alterations so as to include others. (*Meyer v. Lathrop*, 73 N. Y. 322.) The instrument does not constitute a contract, because there is no consideration to support it. (*First Nat. B'k v. Dana*, 79 N. Y. 116.) There being then no consideration for the instrument, it is not a valid and binding contract, but, at most, a mere license. (*Roosevelt v. Dreyer*, 12 Daly, 370, 374.) As a mere license, it was revocable by plaintiff, and was revoked before the commission of the acts complained of. (*Ketchum v. Newman*, not reported; *Wood v. T.* 12 M. & W. 838.) Plaintiff had the right at any time during the progress of the alterations, and until their final completion, to revoke the license; until then it was executory only and certainly not executory as to those alterations which were not completed until a month after the completion of the others. (*Utter v. Utter*, 1 Keyes, 111; *Murdock v. P. Park & O. Co.*, 73 N. Y. 579; *Cronkhite v. Cronkhite*, 94 id. 32; *yea v. Mayor, etc.*, 96 id. 477.)

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W. W. *Westervelt* for respondents. For the purpose of destroying the effect and operation of the instrument plaintiff is estopped from denying the payment of one dollar consideration therein named, (*Grout v. Townsend*, 2 Hill, 554; 2 Den. 336; *Childs v. Barnum*, 11 Barb. 14; *Oakley v. Boorman*, 21 Wend. 583.)

EARL, J. This action was brought by the plaintiff to recover damages for certain trespasses committed upon premises occupied by her in the city of New York, and upon the trial, at the close of all the evidence, she was nonsuited. That the alleged trespasses were quite serious and caused her substantial damage, cannot be disputed. The plaintiff was the tenant of the defendant Walton in the occupancy of the rooms on the second floor of the building situated on the corner of West Fifty-first street and Eighth avenue, numbered 851 on the avenue. The lower story of the building was occupied as a store. Walton was also the owner of the four buildings adjoining No. 851 on the north, the lower stories of which were also occupied as stores and the upper stories by tenants hiring living apartments. In April, 1880, Walton desiring to make certain alterations and improvements in his stores, procured the plaintiff and eight other tenants occupying rooms above the stores, under separate leases, to sign an instrument, of which the following is a copy: "We, the undersigned, do hereby agree, for the consideration of one dollar to us paid, the receipt of which we hereby acknowledge, to permit William T. Walton, or his agents, to make any alterations which he or they may deem necessary to carry out the plans and specifications in changing the house we now occupy." The alleged trespasses upon the premises occupied by the plaintiff were committed after the execution of this instrument, and, as the defendants claim, for the purpose of making the alterations therein referred to. There is dispute in the evidence as to what took place and was said when the instrument was signed, the plaintiff claiming that she was induced to sign it by misrepresentations and misapprehension as to the extent of the alterations to be made. The defendants claim

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that they were justified in their interference with the plaintiff's premises by that instrument.

The trial court held that the instrument was invalid as an agreement but operative as a license, and on that ground nonsuited the plaintiff. But the General Term held that it was valid as an agreement and upon that ground affirmed the nonsuit. We are constrained to differ with both of the learned courts. The instrument is not under seal and is, therefore, not entitled to the common law or statutory presumption of consideration. (Code, § 840.) The plaintiff testified, without contradiction, that the dollar was not paid. But the defendants had the right, if they could, to show that that was not the real consideration, and that it was something else. This they attempted to do by showing that the consideration was the leasing of the premises for another year by Walton. But the plaintiff denied that consideration and gave evidence tending strongly to support such denial, and, as she was nonsuited, her evidence must now be taken as true; and such was the view of the General Term. But it held that there was the presumption of an agreement to pay the dollar, and thus that there was a sufficient consideration, citing as authority for its conclusion the cases of *Oakley v. Boorman* (21 Wend. 588), and *Childs v. Barnum* (11 Barb. 14). In each of those cases, however, the instrument under consideration was under seal and the court held that the statutory or common law presumption of a consideration was not overcome by simple proof that the moneyed consideration named in the instrument was not paid. But those cases are not authorities for this case. Here there is no presumption that there was any consideration other than that expressed, and the circumstances repel the existence of such a consideration as the General Term presumed. There is no such presumption arising from anything that appears on the face of the instrument. That recited the consideration of a dollar actually paid, the receipt of which is acknowledged, and not a dollar agreed to be paid; and there can be no presumption that Walton agreed to pay one dollar to all the tenants jointly, although

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they had no joint interest. Further, no such consideration was claimed, or in any way hinted at on the trial. But all the circumstances surrounding the execution of the instrument were minutely proved, and there is not a particle of evidence tending to show any such consideration. The only evidence as to the consideration given by defendants pointed to the consideration above alluded to, to wit, the letting for a new year. When it is shown that the consideration mentioned in an instrument not under seal was not actually given or promised, and a party to it claims that there was some other consideration, it is incumbent upon him to show it; and in this respect the defendants here failed. But even if the promise to pay the dollar could properly be inferred from the evidence in this case, it was an inference to be made by the jury, and not by the court. The agreement was, therefore, invalid and cannot as such furnish a justification to the defendants.

But the instrument, although invalid as an agreement, might operate as a license. Here, however, the defendants have other difficulties to encounter. As the instrument was not binding as an agreement, it was not conclusive and binding as evidence against the plaintiff. While more cogent and persuasive than oral evidence, it was of no higher nature, and it could be explained, varied or contradicted by oral evidence. (*Roosevelt v. Dryer*, 12 Daly, 370.) She could not be bound to a license broader and of greater scope than she actually gave, and, like an oral license, it could be revoked before it was acted upon. The plaintiff gave evidence, which must now be taken as true, that the license she actually gave and intended to give related only to alterations to be made on the south side of the building, and such alterations were all completed before the trespasses of which she complains in this action; and hence the defendants had no license to protect them for these trespasses.

But if we assume, as claimed by the defendants, that the license, as originally given, was as broad as the written instrument, the defendants are still unprotected, because before the

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alleged trespasses it was revoked by the plaintiff. The trial judge, however, held that the plaintiff had lost the right of revocation because, on the faith of it, Walton had entered into contracts for making the alterations and was at the time of the revocation engaged in making them. It is undoubtedly true that a license may be so far acted upon that it cannot be revoked, the licensor being bound by an estoppel *in pais*. If one licenses another to cross his premises, he cannot revoke it when the licensee is midway and cannot retrace his steps. If a tenant licenses his landlord to enter upon his premises to repair a roof, after the landlord has torn off the shingles the tenant cannot revoke the license so as to prevent the landlord from putting on new shingles and thus protecting his building. So here, if Walton, under the license, had entered upon his alterations and had gone so far that he could not recede without detriment or damage to his building, the case might have been such that his further operations could not have been arrested by a revocation of the license. But the proof shows that Walton did not enter upon the alterations in the making of which the trespasses were committed until after the revocation of the license, and that he did not even enter into contract for the making of the alterations until after such revocation. There is nothing, therefore, in the facts proved which shows that the plaintiff was bound by any estoppel or that she was too late in her revocation. That there may be no misapprehension as to our views, we say, in conclusion, that the case must be quite peculiar and exceptional which would authorize a licensee to proceed under his license after the revocation by the licensor, and courts are quite disinclined, by the application of rules relating to estoppels *in pais*, to give to mere licenses based upon no consideration the force and effect of valid agreements. (*Babcock v. Utter*, 1 Abb. Ct. of Ap. Dec. 27; *Murdock v. P. P. & C. I. R. R. Co.*, 73 N. Y. 579; *Wiseman v. Lucksinger*, 84 id. 31.)

The judgment should, therefore, be reversed, and a new trial granted, costs to abide event

All concur.

Judgment reversed.

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118 231

ISAAC McCONIH Respondent, v. FRANÇOIS A. FALES et al.,
Appellants.

A defense to the foreclosure of a purchase-money real estate mortgage on the part of the mortgagor, alleged to have existed at the time of its inception, can only arise where fraud has been practiced by the mortgagee in procuring its execution, or there is a failure of consideration.

Where, therefore, the purchaser is in the undisturbed possession of the land he cannot, in the absence of fraud, resist the foreclosure of such a mortgage on the ground simply of defect of title.

A purchaser of the mortgaged premises, who takes a deed subject to the mortgage, is estopped from contesting the consideration or validity of the mortgage; and, so long as he remains in possession of the premises, cannot defend against the mortgage because of failure of title.

The members of the firm of McD., K. & Co., purchased, for the purposes of the firm business, certain real estate which was conveyed to the individual members and thereafter used by the firm. McD. died intestate, and his interest in the real estate was sold by order of the surrogate to pay his individual debts, the purchaser conveyed said interest to E. who sold and conveyed the same to C., taking the bond of the latter, secured by mortgage on the interest purchased to secure a portion of the purchase-money. E. also caused to be conveyed to C. a third interest in the firm business, the latter covenanting to pay all the existing debts of the firm. C., with the surviving partners, formed a copartnership to carry on the business, and used and occupied the said real estate. The new firm having become insolvent, made a general assignment for the benefit of creditors, which included the said real estate. The assignees sold and conveyed the same to F., subject to all liens and incumbrances. F. took and retained possession. In an action to foreclose the mortgage so given by C. it did not appear that there were any debts of the old firm outstanding or existing at the time of the conveyance to him. *Held*, that neither C. nor F. or his grantees had any legal or equitable defense to the mortgage; that E. at the time of his conveyance to C. had an interest in the property capable of being transferred by deed, which furnished a sufficient consideration for the bond and mortgage, and that the same was a valid and subsisting lien at the time of the conveyance to F.; that no equities existed in favor of creditors giving the assignees power to question the lien of the mortgage; but even if there were, as they did not, and did not transfer any right to do so, but sold subject to existing liens, their grantee and those succeeding to his interests acquired no such right.

(Argued October 24, 1887; decided November 29, 1887.)

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made June 29, 1885, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to foreclose a mortgage executed by defendant Clark. The facts are sufficiently set forth in the opinion.

E. F. Bullard for appellants. The machinery had been put upon the real estate for manufacturing purposes, and as such became a part of the real estate. (*McRae v. Cent. Bk.*, 66 N. Y. 489.) In equity partnership real estate is considered personal property. (Story on Part. § 92, note 2; *Delmonico v. Guillaume*, 2 Edw. Ch. 366; *Tarbell v. West*, 86 N. Y. 290.) One party cannot convey or mortgage any share of the firm property or create any liens on the *corpus*. (*Menagh v. Whitwell*, 52 N. Y. 146, 154; *Cooper's Appeal*, 29 Penn. 156; *Savage v. Putnam*, 32 N. Y. 501; *Tarbell v. West*, 86 id. 287.) The real estate in question was partnership property. (*Field v. Fairchild*, 64 N. Y. 471; Lindley on Part. 667; Story on Part. § 92, note 2; *Smith v. Danvers*, 6 Sandf. 669.) The partners, as such, can sell the firm property and give a perfect title, notwithstanding one partner may have given a mortgage upon his share. (*Tarbell v. West*, 86 N. Y. 289; *Staats v. Bristow*, 73 id. 364; *Case of Bowas*, 11 N. H. 404.) The assignees and Fales as a purchaser under them represented all of the creditors. (Laws of 1858, chap. 314; *Sands v. Hildreth*, 14 Johns. 493; 15 Wend. 588; 18 id. 375; 3 Barb. Ch. 613; *Southard v. Benner*, 72 N. Y. 424.) The property described in the mortgage as real estate, being partnership property, was to be treated as personal property for the purpose of paying partnership debts and adjusting the equities between the partners, and what remained was to be treated as real property. (*Tarbell v. Bradley*, 86 N. Y. 280, 288; 7 Abb. [N. C.] 273; *Menagh v. Whitwell*, 52 N. Y. 146, 158; *Buchan v. Sumner*, 2 Barb. Ch. 167; *Hiscock v. Phelps*, 49 N. Y. 97; *Tarbell v. West*, 86 id. 287; *Murray v. Mumford*,

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7 Cow. 441; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; 86 N. Y. 290.) Conceding that the defendants did not acquire the full title to all of the real estate under the purchase from the assignees, and that some lien yet remained in favor of the plaintiff, then it became the duty of the referee to determine the defendant's equities which were prior to the plaintiffs, so that the purchaser would know what he was buying. (*Wetmore v. Roberts*, 10 How. 51; 17 N. Y. 88; *R. R. Co. v. Swoazy*, 23 Wall. 407; *Sutherland v. L. S. R. R. Co.*, 9 B'k Reg. 298, 305; *Green v. Putnam*, 1 Barb. 500; *Ford v. Knapp*, 102 N. Y. 135; *Town v. Medham*, 3 Paige, 553; 2 Story Eq. § 1237; *Clute v. Emmerich*, 99 N. Y. 342.) Partners are jointly liable to third parties for all of the debts. As between themselves, they are sureties that the others shall pay their proper share. (*Clark v. Mackin*, 95 N. Y. 346; *Havens v. Willis*, 100 id. 482; *Acer v. Hotchkiss*, 97 id. 395; *Shamburgh v. Abbott*, 5 East. Rep. 862; *Gans v. Thieme*, 93 N. Y. 225; *Perry v. Bd. of Missions*, 102 id. 99; *Clute v. Emmerich*, 99 id. 346; *Lovejoy v. Bowers*, 11 N. H. 405; *Lewis v. Hawkins*, 23 Wallace, 120.)

Charles E. Patterson and *Orin Gambell* for respondent. This real estate, as between the partners, was not partnership property. (*Hiscock v. Phelps*, 49 N. Y. 97.) The real estate having been conveyed to the individual members who composed the first firm of McDonnell, Kline & Co., they held it at all times as individual property, and the moment the firm debts were paid and there was no claim on the part of a copartner for advances, the title was clear, and either copartner could convey his interest; and the moment the debts of the firm, which were outstanding at the time of John McDonnell's death, were paid, the title of McDonnell's interest at once became vested in his heirs, and could never thereafter be invested with a personal character. (*Fairchild v. Fairchild*, 64 N. Y. 471.) A purchaser from one member of a firm of his interest, acquires no title to any share of the partnership effects, but only to the assignor's share of the surplus after

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an accounting and an adjustment of the partnership affairs, except in the case of a *bona fide* purchaser for value of land, without notice that it is partnership assets. (*Menagh v. Whitwell*, 52 N. Y. 158; *Tarbell v. West*, 86 id. 286.) This mortgage having been given for the purchase-price of property which was put into or used by the partnership, neither a partner nor a creditor has any equity to hold such property as partnership property, applicable to the payment of firm debts, until the seller who parted with his title is paid the purchase-price for such property. (*Garson v. Green*, 1 Johns. Ch. 308; *Dubois v. Hull*, 43 Barb. 26-30; *Ellis v. Harriman*, 90 N. Y. 467.) So long as that assignment remains unimpeached, the assignees are the only parties, if any there be, who can now question the validity of the lien of this mortgage. (*Spring v. Short*, 90 N. Y. 538, 544, 545; *Lowery v. Clinton*, 32 Hun, 267; *Childs v. Kendall*, 30 id. 227.) The widow and son of John McDonnell having taken or purchased his interest in the partnership of McDonnell, Kline & Co., and they and the survivors of the old firm having assumed and agreed to pay the debts of the old firm, the new firm became in equity the principal debtors, and the estate of John McDonnell only the surety; and the creditors having accepted credit of the new firm or firms succeeding the surety, remain wholly discharged, and thus the real estate covered by this mortgage became released from all claims of the creditors. (*Colgrove v. Tallman*, 67 N. Y. 95; *Morse v. Gleason*, 64 id. 204; *Savage v. Putnam*, 32 id. 501; *Bilborough v. Holmes*, 22 Eng. R. 67, 69; *Luddington v. Bull*, 77 N. Y. 138.)

RUGER, Ch. J. In considering this case it is desirable to keep in view some of the elementary principles, bearing upon the questions involved, and which seem to us to be decisive of the merits of this appeal.

A defense to the foreclosure of a purchase-money mortgage on the part of the mortgagor, alleged to have existed at the time of its inception, can only arise when fraud has been practised by the mortgagee in procuring its execution, or there

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is a failure of consideration. Thus it is held that a purchaser of land who has given a bond and mortgage thereon to secure the purchase-money, and is in the undisturbed possession thereof, cannot resist the foreclosure of the mortgage on the mere ground of a defect of title, there being no allegation of fraud in the sale, nor eviction. (*Abbott v. Allen*, 2 Johns. Ch. 520; *York v. Allen*, 30 N. Y. 104.) In such case he is remitted for relief, if any he has, to the covenants contained in his deed, and if there are no such covenants he is remediless. (*Banks v. Walker*, 2 Sandf. Ch. 344; *Parkinson v. Sherman*, 74 N. Y. 88; *Frost v. Raymond*, 2 Caines', 188; *Leggett v. McCarthy*, 3 Edw. Ch. 124; *Edwards v. Bodine*, 26 Wend. 109.) "The rule (says Mr. Justice SWAYNE, in *Peters v. Bowman*, 98 U. S. 56), is founded in reason and justice. A different result would subvert the contract of the parties and substitute for it one which they did not make. In such cases the vendor, by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property."

A purchaser of mortgaged premises who takes a deed thereof subject to the mortgage, and agrees to pay the same, is estopped from contesting the consideration or validity of the mortgage, and when the mortgage is given by his grantor to secure the purchase-money, such grantee cannot, so long as he remains in possession of the premises, defend against the mortgage because of failure of title. (*Parkinson v. Sherman*, *supra*; *Ryerson v. Willis*, 81 N. Y. 277.) The mortgagee's title cannot be questioned in defense of a bill for foreclosure. If he takes by virtue of his mortgage any estate whatever which is still subsisting, he is entitled to a decree and the court will not inquire what interest he has in the mortgaged estate. (Jones on Mort. § 1492.) The mortgage sought to be foreclosed in this action was given by Augustus Clark to Edward McDonnell in August, 1880, to secure the purchase-price of

the mortgaged real estate conveyed by the mortgagee to the mortgagor at the same date. The property consisted of the real estate pertaining to a manufacturing establishment in the city of Amsterdam, and McDonnell's deed purported to convey an undivided third part of such estate to Clark, who, thereupon, took possession of such property, and, having become a member of the firm, continued to possess and enjoy it in common with the other owners, until December 3, 1883, when the whole property was transferred by Clark and his copartner to certain assignees for the benefit of their copartnership creditors. The property was, in March, 1884, sold and conveyed to the defendant Fales by the assignees, subject to all liens and incumbrances existing against it, and Fales subsequently entered into a written contract to sell and convey it to the defendant Consalus.

The defendants, Clark, Fales and wife, and Consalus, interposed answers to the complaint and defended the action, but judgment having been rendered for the plaintiff upon the trial, the defendant Clark dropped out of the controversy, and appeals from the judgment were taken by Fales and wife and Consalus alone.

The defendant Fales claims title to the property through Clark, and, inasmuch as he took it with full notice of all of the facts which then affected it, he, of course, took no greater or different interest than that possessed by his grantor. All claims set up in the several answers founded upon charges of fraud or misrepresentation by McDonnell, the mortgagee, upon Clark, the purchaser, at the time of the execution of the deed and mortgage, have been disposed of by the findings of the referee and no longer remain in the case as questions to be considered upon this appeal. The question here to be considered consists solely of that arising under the first count of the defendant Fales' answer. The allegations of this count are as follows: "That on or about August 14, 1880, Perry Kline, Thomas Harvey and Lucy McDonnell were partners doing business at Amsterdam, N. Y., under the firm name of McDonnell, Kline & Co.; that as such partners they then

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owned and occupied the real estate described in the complaint, which had been purchased and paid for with the partnership funds of said firm and its predecessors; that at that time the legal title of one undivided third part of said real estate was nominally vested in one Edward McDonnell for the benefit of Lucy McDonnell; that at that time the said firm owed a large amount of debts exceeding \$100,000, and their firm property at that time was not worth sufficient to pay the amount of such indebtedness, and said firm was in fact then insolvent; that said debts were equitable liens upon all of the partnership property then owned by said firm, including the real estate in question; that on or about said 14th day of August 1880, said Edward McDonnell agreed to sell his interest in said real estate, and the interest which the said Lucy McDonnell had owned in said firm property, to the defendant, Augustus Clark, for the consideration of \$20,500, to be paid by said Clark to the said Edward McDonnell therefor, but the sale to be subject to the payment by said Clark of one-third of the partnership debts aforesaid; that in pursuance of said agreement said Edward McDonnell acquired the interest of said Lucy McDonnell in said firm property subject to the payment of the firm debts, and then and there conveyed and transferred such interest to the defendant Clark, who thereupon paid toward the purchase-price \$10,500, and to secure the balance gave the mortgage mentioned in the complaint in this action." The answer then proceeds to state that Clark thereupon became a partner in said business with Kline and Harvey, and that subsequently, in 1882, Harvey sold out his interest to Clark and Kline, who continued the business until December, 1883, when, being insolvent, they made a general assignment of all their property to assignees for the benefit of their creditors; that on or about March, 1884, said assignees sold and conveyed said real estate, with other partnership property, to the defendant Francis A. Fales for \$35,000, subject only to two mortgages, one for \$25,000 and the other for \$15,000; whereupon it alleged the title of said real estate became vested in Francis A. Fales free from any lien under the mortgage in suit.

It was also alleged that the indebtedness of the old firm of McDonnell, Kline & Co. had been renewed or extended by the succeeding firms to the amount of \$110,000, and that at no time after August, 1880, was the interest of either partner in such partnership property worth anything over and above the payment of the partnership debts.

The relief asked for was "that the title conveyed to said Fales be declared superior and prior to any lien or claim of the plaintiff under the mortgage set out in the complaint * * * and that said mortgage be removed from the record as a cloud upon the title of said Fales." It is not claimed that the facts set forth in this count constituted any defense to the mortgage so far as Clark, the mortgagor, is concerned, but the contention is that the defendant Fales, by his deed from the assignees, has acquired some other interest, which gives him an equitable defense to the mortgage.

It will be observed that no claim is made that any covenants in McDonnell's deed to Clark have been broken, or that in fact there were any such covenants; and it conclusively appears in the case that Clark received, through McDonnell's deed, all of the property bargained for and the precise consideration for the obligation executed by him, which he contracted for. It also appeared that he then covenanted with McDonnell to pay all of the existing debts of the firm, the alleged continued existence of which now forms the sole foundation of the appellants' claim for relief. Thus the alleged equities, which are now invoked by the appellants to defeat the mortgage in suit, are precisely those which the mortgagor covenanted to extinguish, and subject to which covenant the appellants are now in possession of the property, claiming title thereto.

In view of the authorities heretofore cited, it is difficult to see how any legal or equitable defense to the mortgage in question is presented by this answer; but if any there was, it seems to have been entirely removed by the findings of the referee founded upon satisfactory evidence negating the material allegations upon which they are founded. Thus the referee

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finds that the original firm of McDonnell, Kline & Co. was solvent at the time of the death of John McDonnell, as was also the second firm of the same name, at the time of the sale to Clark. He also finds that there was no proof that any of the debts of the old firm of McDonnell, Kline & Co. were outstanding, as existing claims against it, at the time the mortgage in suit was given, and he negatives the allegation that Lucy McDonnell ever held the legal title to any part of the real estate in question, or that Edward McDonnell ever assumed payment of any firm debts, but finds that upon John McDonnell's death the real estate descended to his heirs-at-law, and was sold by virtue of the surrogate's order for the payment of his debts, and was purchased on such sale by one O'Bryan, who conveyed it to Edward McDonnell. He further finds that the property in question was sold by the assignees to the defendant Fales, in March, 1884, subject to all liens and incumbrances. These findings are fully supported by the evidence in the case and seem to dispose of the assumed equities upon which the appellants base their argument for a reversal of the judgment.

There is no question made but that Edward McDonnell had the legal title to the property mortgaged at the time of his conveyance to Clark, and a consequent interest therein capable of being transferred by deed (*Bliss v. Cottle*, 32 Barb. 322; *Wilson v. Wilson*, 20 How. Pr. 41; *Fairchild v. Fairchild*, 64 N. Y. 471), and there is just as little question but that such interest furnished a sufficient consideration for the bond given back, for the purchase-money and the mortgage executed to secure its payment. This mortgage was a valid and subsisting lien at the time of the conveyance to Fales upon the property described in it, for the sum therein mentioned, even though its object was liable thereafter, to be defeated by the exhaustion of the fund through the enforcement of prior liens, whether legal or equitable, affecting the property conveyed. It follows, as a necessary consequence from these facts, that the defendant Fales, having acquired title to the property in question, subject to all liens and

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incumbrances upon it, is not, and neither can his grantees be, at liberty to question the liability of the property mortgaged for the payment of the mortgage debt. Even if it was in the power of the assignees, as representatives of creditors, to question the lien of this mortgage, they never did so, and they transferred no right to do so to their grantees; but by making the deed subject to existing liens and incumbrances, impliedly withdrew such right from them, and made their title depend upon the payment of the mortgage. The transfer from the assignees to Fales conveyed simply an equity of redemption in the premises, and by the terms of their deed he took no greater interest in the property than such as remained after the extinguishment of the liens then resting upon it. (*Eagle Fire Co. v. Lent*, 6 Paige, 635.) The attempt of the appellants to clothe themselves with any supposed equities existing in favor of creditors, has, therefore, no foundation in the facts of the case, as there were no such equities existing, and even if there were, the defendants have not succeeded to them.

But a further answer to the contention of the defendants is found in the fact that there are no such creditors asserting claims which antedate the execution of the deed and mortgage in suit. The debtor firms existing at that time, and previous thereto, were solvent, as found by the referee, at the date of McDonnell's deed, and the individual members of such firms had an interest in their assets, capable of being sold and conveyed, and of being made the subject of security for the payment of the purchase-price of the property. In so far as those interests became contributions to the capital of subsequent firms, formed to carry on the same business, they could only be used for that purpose, subject to the liens already existing upon them, and the creditors of such firms could acquire no right to contest the validity of such liens, except such as belonged to the firm itself.

The attempted defense of the appellants is simply a claim that, at the time of McDonnell's deed to Clark, there were outstanding claims in favor of creditors, which might have been used in equity to extinguish McDonnell's legal title and

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thus produce a failure of consideration for the mortgage. This defense is not sustainable either in law or equity, or by the facts of the case.

The judgments of the courts below should be affirmed, with costs against the appellants.

All concur.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent v.
DANIEL DRISCOLL, Appellant.

Under the provision of the Code of Criminal Procedure (§ 528, as amended by Chap. 493, Laws of 1887), vesting in the Court of Appeals jurisdiction to examine the record on appeal in a criminal action "where the judgment is of death," and to determine upon the whole case whether "the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," the defendant is not given and may not claim, as matter of right in this court, the benefit of errors occurring on the trial; the failure to make proper objections and take exceptions deprives them of that right; the court is simply vested with a power in its discretion to disregard the neglect and without regard to exceptions to review the case upon the merits.

Where, therefore, evidence was received or rejected without objection, on the trial in such an action, which if proper objections and exceptions had been taken, would have required a reversal, the court is not bound to reverse, and is only authorized to do so, in its discretion, where it appears affirmatively from the whole case, that injustice has been done to the accused in the result arrived at by the trial court.

On the trial of an indictment for murder, wherein it was claimed by the prosecution that the deceased was shot by defendant, on the cross-examination of one McM. the defendant was permitted to prove that immediately after the shooting the injured person stated in the presence of McM. and others, that McM. had shot her. *Held*, it was competent for the prosecution to prove that McM., at the time, denied the charge, produced his pistol, and delivered it to an officer present; also that the pistol was fully loaded, and its barrel cold.

A witness, who testified to these facts in regard to the pistol, added that the pistol bore no appearance of having been fired off. Defendant's counsel moved to strike out the whole evidence. *Held*, the motion was properly denied; that if the inference the witness drew from the facts was alone

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intended to be excluded by the motion, it should have been particularly referred to; that, as made, the motion called for too much, and was properly denied. Also, that the inference of the witness was immaterial and could have done no injury.

(Argued October 26, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 20, 1887, which affirmed a judgment of the Court of General Sessions, in and for the city and county of New York, entered upon a verdict convicting the defendant of the crime of murder in the first degree.

The facts, so far as material, are stated in the opinion.

William F. Howe for appellant. It was error to receive evidence of what McCarthy said and did when confronted with the deceased, in Driscoll's absence, some time subsequent to the shooting. (*Greenfield v. People*, 85 N. Y. 88; *People v. Murphy*, 101 id. 127; *Loneragan v. People*, 6 Park. Cr. Rep. 229; *People v. Davis*, 56 N. Y. 95, 101; *Whittaker v. Eighth Ave. R. R. Co.*, 51 id. 299; *Luby v. H. R. R. Co.*, 17 id. 131.) The denial by McCarthy was not part of the *res gestæ*. (*Wadele v. N. Y. C. & C. R. R. Co.*, 95 N. Y. 274.) Where a statement forming part of a conversation is given in evidence by one party, whatever was said in the same conversation, tending to explain or qualify that statement may be given in evidence by the other, but the latter cannot give in evidence distinct and independent statements in the same conversation, in no way connected with the statement proved by his adversary, on the ground that he had opened the subject by his examination. (*People v. Beach*, 87 N. Y. 511, 512; 1 Phil. on Ev. 416; *Platner v. Platner*, 78 N. Y. 103; *Rouse v. Whited*, 25 id. 170; *Garey v. Nicholson*, 24 Wend. 350; *People v. Irving*, 95 N. Y. 541.) It was error to permit Monahan to testify that there was no indication that McCarthy's pistol had been recently fired. (1 Greenl. on Ev. § 440, Best Prin. of Ev. §§ 344, 349; *De Witt v. Barley*, 9 N. Y. 384; *Ferguson v. Hubbell*, 97 id. 507; *Manker v. People*, 17 Hun, 416; *Wynne v. State*, 56 Ga. 113.)

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McKenzie Sample for respondent. The court did not err in admitting in evidence the statement of the officer as to the condition of the pistol when he received it from McCarthy. (Wharton on Ev. § 810; *Wynne v. State*, 56 Ga. 113; *Comm. v. Sturtevant*, 117 Mass. 122.)

RUGER, Ch. J. The questions involved in this appeal are so fully and satisfactorily discussed in the opinion of BARTLETT, J., at General Term, that it is unnecessary to go much into detail, in giving our reasons for affirming the judgment of the court below. In capital cases, however, it has been the custom of this court to state with some particularity, the grounds upon which its decision is based, although it may involve, to some extent, a repetition of the views expressed by other courts.

The record in this case shows that the defendant was tried September 27, 1886, in the Court of General Sessions of the city and county of New York, upon an indictment charging him with the crime of murder in the first degree, in having killed one Bridget Garrity, by discharging at her a pistol loaded with gunpowder and bullet, which latter penetrated her body and caused her death. The crime was alleged to have been committed on the 26th day of June 1886, and the evidence showed it to have been perpetrated at about four o'clock in the morning at No. 163 Hester street, New York, in a building occupied by one John McCarthy as an assignation house. The witnesses of the homicide were principally persons of disreputable character, and their evidence was very contradictory and incapable of being altogether reconciled or harmonized. In this conflict of testimony it became the duty of the jury to determine which of the versions given by the eye-witnesses of the transaction, was the true one, and the defendant was found guilty of the crime. Upon appeal the General Term of the Supreme Court affirmed the conviction. Subsequent to June 20, 1887, this appeal was taken from the judgment of affirmance. By chapter 493 of the Laws of 1887, section 528 of the Code of Criminal Procedure, was so amended as to vest this court with jurisdiction to examine the record and determ-

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ine upon the whole case, whether it is satisfied "that the verdict was against the weight of evidence, or against law, or that justice requires a new trial whether any exceptions shall have been taken or not in the court below." This provision has very much enlarged the jurisdiction and the labors of this court, and requires us to review the facts in every capital case, and to determine whether, upon all of the evidence, there is, in our opinion, good and sufficient reason for setting aside the verdict of the jury and granting a new trial. The powers conferred by this section are similar to those formerly given to this court in certain cases by chapter 337 of the Laws of 1855, as amended by chapter 330 of the Laws of 1858, and to the Supreme Court by section 527 of the Code of Criminal Procedure. (*O'Brien v. People*, 36 N. Y. 276.)

It seems to have been the intention of the legislature to vest this court with power, in its discretion, to disregard the neglect or omission of the accused to take the customary objections and exceptions on a trial, and grant a new trial when such a course would be in furtherance of justice and conduce to the humane administration of the law. These provisions, however, do not authorize the appellate court to disregard the effect of valid exceptions taken by an accused party on the trial (*O'Brien v. People*, *supra*), or excuse such party from complying with the settled rules of practice applicable to the trial of criminal cases, or exempt him from the duty of presenting the usual and ordinary questions arising on the trial of a case, in the form and manner heretofore pursued in the trial of indictments.

The omission of counsel for the defendant to make the proper objections and take exceptions to alleged erroneous proceedings would, under the amendment referred to, seem to deprive him of the privilege of claiming, as matter of right, in the appellate court, the benefit of errors occurring on the trial, and remit him to an appeal to the discretionary power of the appellate court, which arises when, upon an examination of the whole case, it appears affirmatively that injustice has been done to the accused in the result arrived at

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by the trial court. In the discussion of the broad question in the appellate tribunal as to whether substantial justice has been done to the accused upon his trial, it is open to him now to urge a review upon the merits of the case, regardless of exceptions, but in reviewing the various incidental questions arising during the progress of the trial, and the exceptions taken to the admission or exclusion of evidence, or to the instructions of the court, regard must still be had to the established rules of law regulating such proceedings. The effect to be ascribed to provisions similar to the one in question in appellate courts, has been heretofore the subject of some discussion in the cases, but without eliciting any certain or well-defined rule as to the precise extent and character of the jurisdiction conferred by similar provisions. (*Wilke v. People*, 53 N. Y. 525; *Levy v. People*, 80 id. 327, 336; *Ferris v. People*, 35 id. 125; *People v. McCann*, 16 id. 58; *O'Brien v. People*, 36 id. 276.)

The general rule derived from these authorities, seems to be to leave it discretionary with appellate courts, whether they will give effect to claims of error or illegality in particular cases, when the error is not pointed out on the trial and objections and exceptions taken thereto in the usual manner. A brief statement of the leading features of the evidence will serve to show the reasons which have led us to approve the verdict of the jury. That Bridget Garrity was murdered at the time and place alleged, and in the manner charged, was not disputed on the trial, and the only issue of fact tried was whether the fatal shot was discharged by the defendant, or some other person. The defendant attempted to show that it was fired by John McCarthy. The uncontradicted evidence showed that about two weeks previous to the homicide, an altercation arose between the defendant and McCarthy in the streets of New York, and McCarthy, upon that occasion, discharged two pistol shots at the defendant with an apparent intent to kill him, but in fact inflicted no injury upon him. It does not appear that these parties met again until the morning of the murder.

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The crime charged in this indictment was committed upon the first floor of McCarthy's house. This consisted of a hall and a front and back room lying alongside of and to the left of the hall. The hall extended from the front to the back of the house, and two doors opened therefrom into the back and front rooms, respectively, and these rooms opened into each other by large folding doors. The defendant's version of the transaction is that at about midnight of June 25, 1886, he met another man and two women, one of whom was the deceased, at a drinking saloon in Worth street, and they continued together from that time until after the shooting. For several hours of the night they wandered from one saloon to another, drinking frequently at each place visited, until finally they reached McCarthy's house, and without any apparent or plausible reason for doing so entered it, the deceased going first followed by the defendant and their companions. Immediately upon entering the hall they advanced through it to the door opening into the front room and entered it, Garrity leading the way, and as she stepped into the room, a shot was fired by some one inside which killed her. The defendant did not recognize the person who fired the shot, but his male companion testified that it was McCarthy. They both testified that Driscoll did not fire a pistol at all that night. Driscoll testified that after this shot he immediately ran away, and remained in hiding until discovered and arrested by the officers of the law. There was much direct evidence given on the part of the People to controvert this version of the crime, and the circumstances seem to us to contradict it and point with much force to the defendant as its perpetrator.

At the time of the shooting six or eight persons occupied the rooms where it occurred; some of them were asleep, others were playing cards, and still others were watching the game and engaged in conversation. McCarthy was in the front room, and he testified, that when the door opened and the deceased entered, he saw the defendant behind her and immediately advanced to the door and shoved him out of the room; that immediately thereafter he saw a pistol protruded through

the door and fired into the room; that he immediately ran between the folding-doors through the back room, and jumped out of the window into the yard behind the house; from there he entered the basement and, while there, heard a second shot fired apparently in the hall above; that he went directly from the basement into the upper hall and out into the street, and, after being absent about fifteen minutes, returned to the scene of the affray, where he found the deceased lying on a bed in the back room, and a physician and some policemen standing about the bed. McCarthy also testified that he did not fire off a pistol during this affray. One Carrie Wilson testified that she was in the hall when Garrity and Driscoll entered and that they advanced to the door of the front room which Garrity opened and entered, and, as she saw McCarthy, gave a signal to Driscoll, who advanced to the door and fired a pistol into the room, whereupon the door was crowded back against him and he then went to the door of the back room and, after forcing it open, pointed the pistol into the room and fired again; that the ball discharged therefrom struck Garrity, who was standing at the folding doors between the two rooms, and she fell to the floor.

Two witnesses, who were in the rooms at the time of the occurrence, testified that two shots only were fired, both coming from the hallway, the first one being shot through the door of the front room, and the last one through the door of the back room, whereupon Garrity exclaimed, "I am shot," and fell to the floor. They also testified that McCarthy, as well as most of the occupants of the rooms, had jumped out of the back window before the fatal shot was fired. After the affray a ball of larger calibre than that used in the McCarthy pistol, was found imbedded in the wall of the front room, nearly opposite the door opening into the hall. Immediately after the shooting the defendant was discovered running from the scene of the affray, dressed in a sack coat, with his right hand in its pocket, and, upon being pursued, was found within fifteen minutes after the shooting in a dark room in a house occupied by his mother, near the place of the affray, lying on

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the floor behind a door, dressed only in his shirt and pantaloons. His sack coat had disappeared and could not be found. Upon being arrested he stated that he had been sleeping there since eight o'clock the night before, and denied that he had been at McCarthy's during the night. It further appeared that Driscoll, Garrity and their two companions were met in the street shortly before the shooting by a policeman, and as he passed them Driscoll was heard to say to Garrity, "You damned bitch, I will kick you into the gutter; you won't stick to me;" to which Garrity replied, "Yes, Dan, I'll stick to you; you shoot him and I'll stick by you." It also appeared that immediately after the shooting Bridget Garrity, while lying upon the bed in McCarthy's house, stated in the presence of a physician and the policeman, in answer to a question put to her by one of them, that McCarthy had shot her. McCarthy, who was then present, immediately denied the accusation and produced a pistol from his pocket, which he delivered to the officer. This pistol was fully loaded, its barrels were cold, and none of them appeared to have been recently discharged. Garrity again, after having been removed to the hospital, stated to one of the physicians in attendance that McCarthy fired the shot which killed her. On another occasion, on the same day, when she became conscious that her wound was fatal and that she must soon die, she told her mother that the defendant fired the pistol which wounded her. About five o'clock of the same day she expired from the effect of the wound inflicted upon her. Both McCarthy and Driscoll were immediately arrested, and were each charged in the Police Court with the commission of the crime, but subsequently McCarthy was released from the prosecution for murder and held as a witness to the crime. Upon these facts the jury found the defendant guilty of the crime of murder, and we find no sufficient reason for disturbing their verdict.

Assuming the competency of the declarations made by Garrity as to the identity of the person who shot her, they were entitled to but little weight in view of the fact that she

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was an accomplice in the commission of the crime, and the confederate of the defendant. Her subsequent declaration, made in view of her approaching death, that the shot was fired by Driscoll, quite nullified the effect of her previous statement. That the killing of Bridget Garrity by the defendant was not intended appears altogether probable from the evidence, but that it occurred while he was endeavoring to shoot McCarthy out of revenge for the previous attempt by McCarthy upon his life, seems natural and probable from the character and condition of the man, and the influences which generally inspire and control the conduct of men leading the life, and subject to the habits and passions of the defendant. It may well be inferred from the evidence that the defendant had a motive in going to the house of McCarthy and endeavoring to shoot him, and the conversation occurring between him and Garrity shortly before the affray, shows that he was influenced by it, and that it was then controlling his conduct, and prompting his action. His flight from the scene of the crime and his attempt at concealment, together with his denial that he was present on that occasion, afford some evidence of consciousness of guilt, and this is strengthened by the fact that he threw away or concealed his coat, presumably containing the instrument with which the crime was committed. The fact that a pistol ball was found in the wall of the front room opposite the door, is apparently in conflict with the version of the transaction given by the defendant, and strongly corroborates the account of the affray given by the prosecution. The place where the homicide was committed, in McCarthy's own house, and the unseasonable hour of the night, show that McCarthy was neither contemplating a crime, nor anticipating its commission, but was apparently pursuing his usual, though disreputable, avocation, when rudely interrupted by the violent and unjustifiable intrusion of the defendant and his accomplices into his house and their onslaught upon its inmates. That this was a deliberate and premeditated intrusion, and had crime as its object, seem to be a natural and legitimate deduction from the circumstances of the case as developed by the proof.

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While it would have been more satisfactory if the guilt of the defendant had been altogether established by the testimony of reputable witnesses, free from any imputation of interest or improper motives, yet such evidence cannot often be procured as to crimes committed in the haunts of vice and dissipation, and in such cases the truth must be sought by the aid of such means as the situation affords. It should not shield a criminal from the just consequence of his crime that it was perpetrated in a den of vice and immorality, and in the presence of vile and abandoned profligates, if enough can be derived from the testimony and circumstances of the case, to satisfy a jury beyond a reasonable doubt, of the identity of the person committing it. The law is framed to protect the rights of the wicked and vicious, as well as those of the virtuous and upright, and no excuse can be made for an omission to do so by the courts, except absolute inability on the part of the officers of justice, to produce reasonable and sufficient proof of the guilt of the wrong-doers. In this case we think such proof was produced and such corroboration was afforded to the testimony of the inculpatated witnesses as justified the verdict rendered by the jury.

Some exceptions were taken by the defendant during the course of the trial, to the admission of evidence bearing upon the issues in the case, but we are of the opinion that none of them were well taken. It may be said, with reference to all of them, that the facts attempted to be excluded by the objections, had already been proved in the case by evidence not objected to by the defendant, and were legitimately before the jury for their consideration, when the effort was made to exclude further proof of the same facts.

Among other things, it was claimed that error was committed by the trial court in admitting evidence of the declaration of McCarthy, that he did not shoot Garrity, made in the course of a conversation immediately following the commission of the crime. It does not seem that this evidence, even if improperly admitted, could have had much weight with the jury, inasmuch as McCarthy had already testified that he did

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not, in fact, discharge a pistol, and it would not be likely to give more weight to his unsworn declaration, than it accorded to his sworn evidence, but we are of the opinion that the evidence was competent under the circumstances of the case. The issue was presented by the defendant, that the shot which killed Garrity was discharged by McCarthy, and it was in rebuttal of the defendant's evidence that the declaration was admitted. McCarthy was a witness in the case, subject to the same rules applicable to the testimony of other witnesses, except that his testimony was given under the influence of a motive, and required stricter scrutiny on the part of the court and jury, than that given by more disinterested persons. The defendant, upon the cross-examination of McCarthy, had been allowed to draw out the fact that Garrity, immediately after the shooting, and while lying upon the bed in the back room of McCarthy's house, stated, in reply to a question put to her by a bystander, that McCarthy or the "man with red whiskers" had shot her. This statement was in fact made in the presence of McCarthy, and his declaration was made in reply to this accusation. The statement made by Garrity was not objected to by the People, as it well might have been, for she did not then appear to be laboring under any apprehension of death, and it was neither competent as an *ante-mortem* declaration nor as part of the *res gestæ*. (*Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274.) Such a statement made in the presence of McCarthy, if not denied by him, could, however, hardly fail to have had an important influence upon the deliberations of the jury, and it might reasonably have inferred, from his silence under such an accusation, that he acquiesced therein. The circumstances emphatically called for a denial from him if he proposed to contest its truth, and the absence of such denial would have given a false impression as to the weight and force to be ascribed to the charge made by Garrity.

The defendant, having voluntarily opened the issue as to the admissibility and effect of the conversation, had no right, after obtaining such parts of it as he desired, to shut the door and object to other parts of the same conversation tending to

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impair, explain or contradict the declaration proved by himself. (*People v. Jones*, 106 N. Y. 523; *Homer v. Everett*, 91 id. 641.) The effect of the defendant's contention is that he was entitled to the benefit of an implied admission of the charge of McCarthy's guilt, when, in truth, the accusation was promptly denied, or, in other words, that he had acquired a vested right to the use of an uncontradicted accusation, when, in fact, it was immediately disputed. The law is confessedly tender of the rights of accused persons, but it is hardly subject to the charge of authorizing them to build up theories of innocence based upon fictitious or fraudulent assumptions.

It is further claimed by the defendant that the evidence in relation to the delivery by McCarthy of his pistol to the officer and its production on the trial was error. Evidence that McCarthy had a pistol in his possession at the time of the conversation with Garrity, immediately after the shooting, and that he then delivered it to the officer, at which time none of its barrels were empty, was admitted without objection on McCarthy's direct-examination, and was more fully detailed by that witness upon his cross-examination by the defendant. Subsequently, upon an attempted repetition of some of this evidence by another witness, and after it had been received without objection, the defendant's counsel moved to strike out the testimony of the witness as to what McCarthy said and did, on the ground that the defendant was not present and that it was incompetent. The court denied the motion and the defendant excepted. We think there was no error in this ruling. The fact that the same evidence already appeared in the case, not only without objection, but upon the examination of witnesses by defendant, would render the relief asked by the motion, if granted, a useless proceeding and of no benefit to the defendant.

We are also of the opinion that the evidence was competent as an incident to the conversation, and a pertinent fact to be taken into consideration by the jury in determining the weight and effect to be given to the charge made by Garrity.

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The production of a fully loaded pistol, so soon after the shooting, by McCarthy, and bearing no appearance of having been recently discharged, tended to corroborate and give weight to the statement made by him, that he did not fire the shot that killed Garrity. This was competent evidence for the People in answer to the defendant's attempt to fasten the responsibility for the crime upon McCarthy. Its force and effect was for the jury, but it was competent upon the question as to whether McCarthy had fired a pistol on that occasion. The subsequent production of the pistol on the trial was entirely immaterial, and added nothing to the force of the facts already in evidence.

The motion to strike out the answer of the witness Monahan, to a question put by the court, was properly denied. The witness had already stated, without objection, that in company with other officers, immediately after the shooting, he had examined the pistol and found that "it had not been fired off; that the barrel was cold; it was not warm; there was no indication that the shots had been fired off; they were still full." The court recapitulated these facts to the witness, and asked him if that was right, to which he replied, "Yes, sir." The defendant's counsel then said, "I ask that be stricken out." The motion was denied. We see no error in this. No ground was stated for the motion, and most of the evidence was undoubtedly competent. The evidence that the barrels were full, and appeared to be cold, were facts perceptible to the senses, and were competent in any point of view. The inference that the pistol had not recently been discharged, was a legitimate deduction from the facts stated, and would have been made by the jury even without the testimony of witnesses, and could not possibly have harmed the defendant. If the inference which the witness drew from the facts was alone intended to be excluded by the motion, it should have been particularly referred to. As it was, the motion called for too much, and was properly denied.

Two exceptions to the refusal of the court to charge as requested by the defendant are called to our attention, and

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urged as error, in the appellant's brief. The charge as made was full, fair and unexceptional, and fairly covered all of the questions presented by the evidence on the trial. The disposition made of these questions by Judge BARTLETT, in the opinion delivered at General Term, is so manifestly proper and correct that it needs not that we should add anything to what is said by him on the subject.

The judgments of the courts below should be affirmed.

All concur.

Judgments affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v.
JACOB SHARP, Appellant.

The section of the Penal Code (§ 79), declaring that any person offending against the sections thereof relating to bribery "is a competent witness against another person so offending, and may be compelled to testify upon any trial, hearing, proceeding or investigation," is not violative of the constitutional provision (State Const. art. 1, § 6), declaring that no person shall "be compelled, in any criminal case, to be a witness against himself;" as it is provided in the section not only that "the testimony so given shall not be used in any prosecution or proceeding * * * against the person so testifying" but that "the person testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution or punishment for that bribery."

The said section embraces legislative proceedings or investigations.

Notwithstanding the vesting of judicial power in the courts, certain powers, in their nature judicial, belong to the state legislature and may be delegated to a committee, with authority to take testimony and summon witnesses, and a refusal to appear and testify in obedience to the subpoena of such a committee is a contempt, and under the Penal Code (§§ 68, 69) renders the person guilty of a misdemeanor.

Where a person attends before a legislative committee in obedience to its subpoena and is sworn and examined as a witness, he cannot be deemed a willing or consenting witness, and he does not waive the privilege given by said section by not asserting it before the committee.

The terms of a preamble and resolution directing an investigation, may be looked to to determine the legislative intent.

An indictment for bribery under the Penal Code (§ 78), charged the defendant with offering and giving to F., a member of the common council of

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the city of New York, a specified sum of money, with intent to influence him in the exercise of his powers and functions as such member, upon the application of the Broadway Surface Railroad Company for the consent of the common council to the construction of its railway. On the trial, it was proved that a bribe had been given to and accepted by F.; also, that defendant was subpoenaed as a witness and attended in obedience to the subpoena before a committee of the state senate appointed to investigate the methods adopted by the company in obtaining such consent. The preamble and resolutions appointing the investigating committee were given in evidence. The former referred to the provisions of the Constitution and the statutes relating to street railways requiring the consent of the local authorities, and recited that the charge was made that the consent to the railroad upon Broadway was obtained by fraud and through corrupt influence and bribery of members of the common council, and the committee was authorized by the resolutions to investigate fully the action of the board of aldermen of said city which granted or gave the consent "or of any member thereof who voted for the same in respect thereto." The sergeant-at-arms of the senate was directed to attend the sitting of the committee, serve subpoenas, etc. The prosecution was then allowed to prove under exception and objection the testimony so given by defendant, which tended to show his complicity in the crime. *Held*, error; that the senate had power to authorize the investigation; that the testimony was to be considered as given under compulsion; that the case was covered by said section; and, therefore, that the testimony so given was privileged.

Kilbourn v. Thompson (108 U. S. 176) distinguished.

The history of legislation in this state on the subject of bribery given.

Evidence was allowed to be given on the part of the prosecution, under objection and exception, proving a corrupt proposal made, about a year prior to the offense charged, by defendant to an engrossing clerk of the assembly, to pay said clerk \$5,000 to alter a certain bill in reference to street railways, which said clerk then had in his possession, so that its terms might authorize the construction of a railroad on Broadway in said city. *Held*, error.

Pierson v. People (79 N. Y. 424); *People v. Wood* (8 Parker's Cr. R. 681); *Stout v. People* (4 id. 132); *Commonwealth v. Tuckerman* (10 Gray, 173, 199); *Commonwealth v. McCarthy* (119 Mass. 354); *Commonwealth v. Bradford* (126 id. 42); *Commonwealth v. Merriam* (14 Pick. 518); *People v. O'Sullivan* (104 N. Y. 481); *Commonwealth v. Abbott* (130 Mass. 472) distinguished.

One M., a member of the board of aldermen, called as a witness for the prosecution, testified that after the "consent" was given he received from one De L. \$5,000. After repeatedly denying any understanding on his part that it was paid on account of the Broadway Railroad Company, he was asked: "What did you think at the time, what he gave it to you

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for?" The witness answered, under objection and exception: "I supposed it was for the Broadway Road." *Held*, the testimony was incompetent and its reception error.

The prosecution was permitted to prove, as part of the evidence in chief, by a detective officer that he had been employed by the district attorney to serve subpoenas upon certain persons named in the indictment as co-defendants, who were claimed by the prosecution to be important and material witnesses, and some of whom, especially one M., it had already been proved were intermediaries between the person giving and those receiving the bribes; that he found M. in Canada and served a subpoena upon him; that the others were in Canada also, but that witness did not see them. It was not claimed by the prosecution that defendant was privy to their absence, or that the object of the testimony was to furnish a basis for evidence otherwise inadmissible. *Held*, that the reception of the evidence was error.

Pease v. Smith (61 N. Y. 477), distinguished.

People v. Sharp (45 Hun, 460) reversed.

(Argued October 27, 1887; decided November 29, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made September 26, 1887, which affirmed a judgment of the court of Oyer and Terminer in and for the city and county of New York, entered upon a verdict. (Reported below, 45 Hun, 460.)

The material facts are stated in the opinion.

W. Bourke Cockran, Albert Stickney and Edward W. Paige for appellant. The evidence of Pottle was incompetent to show motive. (*Pierson v. People*, 79 N. Y. 424; *Weed v. People*, 56 id. 628; *Mayer v. People*, 80 id. 364.) No evidence can be given merely for the purpose of establishing a tendency on the part of the accused to the commission of a similar offense. (*People v. Corbin*, 56 N. Y. 563; *People v. Coleman*, 55 id. 81; *People v. Gibbs*, 93 id. 470; *People v. O'Sullivan*, 104 id. 481.) It was error to admit the testimony of the defendant given before the senate committee of investigation. (Code Crim. Pro. §§ 66-69 · Laws of 1869, chap. 742, § 8; *People ex rel. Macdonald v. Keeler*, 99 N. Y. 463, 481.) Where incompetent evidence is received which might, by any possibility, be prejudicial to the prisoner, a judgment founded upon it in any way must be reversed. (*Vicksburg R. R. Co.*

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v. *O'Brien*, 119 U. S. 103; *Greene v. White*, 37 N. Y. 405.) While the court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party. (*Smith v. Shoemaker*, 17 Wall. 630, 639; *Deery v. Cray*, 5 id. 795; *Moore v. Nat. Bank*, 104 U. S. 625; *Gilman v. Higby*, 110 id. 50; *Vicksburg R. R. Co. v. O'Brien*, 119 id. 103.)

Albert Stickney for appellant. It was necessary that the defendant's guilt, either as principal or accessory, should finally be established by evidence of his own acts. (Wright on Crim. Conspiracy, 69, 71; *People v. Toms*, 3 Park Cr. Rep. 256; *People v. Courtney*, 28 Hun, 589; *Cuyler v. McCarthy*, 40 N. Y. 221; *Ormsbee v. People*, 53 id. 472; *Com. v. Work*, 43 Leg. Intell. 57; *Johnson v. Miller*, 63 Ia. 529; *U. S. v. Jones*, 3 Wash. C. C. 209; *Swan v. Com.*, 104 Penn. St. 218; Stephen's Dig. Cr. Law, art. 39; Wharton's Cr. Law, § 1402; *Regina v. Berry*, 4 Foster & F. 389; *State v. Cox*, Missouri, 29; *Clem v. State*, 33 Ind. 418; *Connaughty v. State*, 1 Wis. 159.) The prosecution were bound to establish bribery with money; with the offer, promises or payment of money. It would be a fatal variance to prove only bribery by bonds, or other things of value, or the use of mere political influence. (1 Hawkins Pl. Cr. Bk. 1, chap. 67; *Davy v. Baker*, 4 Burr. 2471; *Johnson v. State*, Mark. & Yerg. 129; *Garner v. State*, 5 Yerger, 160; *State v. Stevenson*, 83 Ind. 246.) It would be a fatal variance to establish only bribery as to the later vote on the second petition. (*People v. Hopson*, 1 Denio, 577; *People v. Baker*, 96 N. Y. 350.) The crime of the defendant was completed, if crime there was on his part, when his act or the act of his criminal agents were completed. (Wharton's Crim. Law, § 1857; *State v. Ellis*, 33 N. J. L. 102; *Walsh v. People*, 65 Ill. 58; *Rex v. Vaughan*, 4 Burr. 2494; *Rex v. Pollman*, 2 Campbell, 230.) It was error to admit the evidence of Pottle, the assembly clerk, as to an

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alleged attempt to bribe him in 1883, when, as he testified, the act of 1883 was in his hands. (Wharton's Cr. Ev. §§ 30, 48; *Regina v. Oddy*, 5 Cox C. C. 210; *Berger v. People*, 9 Week. Dig. 460; *Copperman v. People*, 56 N. Y. 591; *Shaffner v. Comm.*, 72 Penn. St. 60; *Comm. v. Jackson*, 132 Mass. 16; *State v. Lapage*, 57 N. H. 245; *People v. Coleman*, 55 N. Y. 81; *People v. Corbin*, 56 id. 363; *People v. Gibbs*, 93 id. 470; *People v. O'Sullivan*, 104 id. 481, 484.) It was error to allow Fullgraff to testify, almost in the exact words of the statute, that he had committed the crime of bribery. (*Nicolay v. Under*, 80 N. Y. 54, 57; *Miller v. L. I. R. R. Co.*, 71 id. 380, 385; *De Witt v. Barly*, 17 N. Y. 340, 346; *Nichols v. White*, 41 Hun, 152, 155.) It was error to admit the evidence of the witness Brown as to a loan of bank bills by Fullgraff to Carnrick & Read, in February, 1885. (*People v. Plath*, 100 N. Y. 590; *People v. Hooghkerk*, 96 id. 149, 162; *Com. v. Holmes*, 127 Mass. 424.) Even if it had been proved that De Lacey had been a co-conspirator with the defendant himself, the mere statement of De Lacey as to a past fact was not such a declaration as would be admissible against a co-conspirator. It was, at most, an admission of De Lacey. (1 Phillips on Ev. 207, 208; 1 Taylor on Ev. [8th ed.] §§ 593 [530], 594 [531]; Stephen's Dig. of Ev. art. 4, note 3; *State v. Shumaker*, 4 Strobb. 266; *Hardy's Case*, 24 Howell's State Trials, 452; 32 id. 341.) It was error to admit Fullgraff's evidence as to the history of his relations with Carnrick & Read prior to the loan as corroborative evidence. (*Comm. v. Holmes*, 127 Mass. 424.) It was error to admit evidence of Mayor Edson's testimony, as to the considerations which influenced him to write his veto message. (*Hutchings v. Hutchings*, 98 N. Y. 65; *Anderson v. R., W. & O. R. R.*, 54 id. 334; *Greene v. White*, 37 id. 407; *Stokes v. People*, 53 id. 180.) It was error to admit evidence of the mere possession of large bills by other aldermen than Fullgraff, with no evidence whatever of identification, except the mere fact that the bills were large bills. (*Walbridge v. State*, 13 Neb. 236; *State v. Furlong*,

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19 Me. 225 ; *Comm. v. Holmes*, 127 Mass. 424.) Even if it had been proved that Maloney, Keenan, De Lacy, Dempsey and Sayles were co-conspirators with the defendant, evidence of their flight was inadmissible against the defendant. (Whart. Crim. Ev., § 699 ; *People v. Stanley*, 47 Cal. 113.) It was error to admit evidence as to mere entries in the books of the Seventh Avenue Company, of which the defendant was not proved to have knowledge, which were made on the direction of Foshay and Kerr. (*In re Denham & Co.*, L. R., 25 Ch. Div. 752 ; *Weir v. Belt*, L. R., 3 Ex. Div. 238.) Before the senate committee the defendant had no protection on the ground that his answers would criminate him ; and, as his testimony was given under compulsion, which the law did not allow him to resist, he is protected against this use of his evidence on his own trial by the Constitution. (Cushing's Manual Parl. Law, 397, 677 ; 38 Hansard Parl. Debates [1st Series], 919, 956.) In the absence of constitutional restrictions, and within the limits of legislative power, our state legislature is supreme ; and the power of either house, or of its committees, as to this matter of the examination of witnesses, is plenary and unrestricted. (First Constitution of New York, 1 N. Y. R. S. [Bank's 7th ed.], 44 ; 1 R. S. 428, 436-438 ; *People v. Draper*, 15 N. Y. 532 ; *People v. Flagg*, 46 id. 401 ; *People v. Keeler*, 99 id. 463.) The Constitution, which must be supposed to have been framed with reference to the existing law, did not protect a witness from testifying before a legislative committee, nor in any way restrict the powers of the legislature or of a legislative committee, in this respect. (*Boyd v. U. S.*, 116 U. S. 616 ; *Emery's Case*, 107 Mass. 172.) The Penal Code has, on this point, reinforced the common law. (Penal Code, § 69.) As the defendant had no privilege before the senate committee, he was bound to obey the law. He was not called on to commit a misdemeanor, or to claim a privilege that did not exist. (*Boyd v. U. S.*, 116 U. S. 616, 630 ; *People v. Singer*, 18 Abb. [N. C.], 96 ; *People v. McCoy*, 45 How. Pr. 216 ; *State v. Froiseth*, 16 Minn. 296 ; *Emery's Case*, 107 Mass. 172.) Section 79 of the Penal Code is intended to be

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a comprehensive and complete provision to deprive all persons in bribery cases of any privilege and, at the same time, as a necessary condition to so doing, to give them full security against any subsequent use of this evidence in any prosecution or proceeding, civil or criminal, against themselves. (Laws 1853, chaps. 217, 539; Laws 1857, chap. 446; Laws 1869, chap. 742; *People v. Kelly*, 24 N. Y. 72; *Perrine v. Striker*, 7 Paige, 98.) Fullgraff, in addition to being an accomplice, stood confessed as a willful, deliberate perjurer, and his testimony was to be wholly disregarded. (*People v. Evans*, 40 N. Y. 1.) The evidence of the acts of the defendant himself does not tend in any way to connect him with the bribery alleged, either as principal or accessory. (1 Greenleaf's Ev. § 13, note [a]; Will's Circumstantial Ev. 141; *People v. Kennedy*, 32 N. Y. 141; *People v. Bennett*, 49 id. 137, 144; *Pollock v. Pollock*, 71 id. 137; *People v. Williams*, 1 N. Y. Cr. R. 336; *People v. Plath*, 100 N. Y. 590; *People v. Jaehne*, 103 id. 200.) The evidence before the senate committee of Foshay and Kerr, as far as concerns this defendant, was merely hearsay, and therefore inadmissible. (*People v. Davis*, 56 N. Y. 95, 101.) At common law, wherever illegal testimony of importance had been admitted before the grand jury, which the court could see might have had substantial weight in influencing their verdict, the court was bound to quash the indictment on motion. (*People v. Hulbut*, 4 Denio, 133; *U. S. v. Coolidge*, 2 Gallison, 363; *U. S. v. Farrington*, 5 Fed. Rep. 343; *People v. Singer*, 18 Abb. [N. C.] 96; *People v. Sellick*, 4 N. Y. Cr. R. 329; *U. S. v. Kilpatrick*, 16 Fed. Rep. 765, 771; *People v. Restenblatt*, 1 Abb. Pr. 268; *People v. Briggs*, 60 How. Pr. 17; *People v. Moore*, 65 id. 177; *Spanenberger v. State*, 53 Ala. 481; *State v. Lanier*, 90 N. C. 714; *State v. Froiseth*, 16 Minn. 296; *Missouri v. Grady*, 12 Mo. App. 361.) This remedy still remains under the Code. (*People v. Wise*, 2 How. Pr. [N. S.] 92; *People v. Petrea*, 92 N. Y. 132, 144.) The court has the same control of the grand jury that it has of the petit jury, and it is bound to give protection to the citizen against any clear and sub-

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stantial invasion of constitutional rights, with or without a statute. (*State v. Connor*, 1 Head [Tenn.], 28; *People v. Shattuck*, 8 Abb. [N. C.] 33, 35; *People v. Hooghkerk*, 96 N. Y. 149, 159.) The defendant was not barred from this remedy by having pleaded to the indictment. (*U. S. v. Coolidge*, 2 Gall. 363; *People v. Moore*, 65 How. Pr. 177; *People v. Briggs*, 60 id. 17.) The indictments ought all to have been set aside, quashed and dismissed. (*U. S. v. Farrington*, 5 Fed. Rep. 348; *Spanenberger v. State*, 53 Ala. 486.)

Edward W. Paige for the appellant. The defendant was "a person offending against" the provisions of the Code "relating to bribery." (*People v. Mondon*, 103 N. Y. 211; *Hendrickson v. People*, 10 id. 113; *Foster v. Pierce*, 11 Cush. 437; *Comm. v. Pratt*, 126 Mass. 462; *State v. K.*, 4 N. H. 562; *Norfolk v. Gaylord*, 28 Conn. 309; *Chamberlain v. Wilson*, 12 Vt. 491; *State v. Nichols*, 29 Minn. 357; *Howell v. Parish*, 26 La. Ann. 6; *Alderman v. People*, 4 Gibbs. (Mich.) 414; *People v. Freshout*, 55 Col. 375; *Low v. Mitchell*, 18 Me. 374; 1 Greenleaf's Ev. 451; *State v. Quarries*, 13 Ark. 307, 308; *Kneeland v. State*, 62 Georgia, 395, 398; Miller on Competency of Witnesses [Phil. ed. 1881] 79; *Lathrop v. Clapp*, 40 N. Y. 328, 331.) In construing a statute everything in favor of the liberty and the security of the citizen and the protection of the individual is to be liberally and comprehensively interpreted. (Potter's Dwarria, 49; Lieber's Political Hermeneutics, Chap. 5 [16th ed. 1880], 134; *People ex rel. Hackley v. Kelly*, 21 N. Y. 74, 81, 82; *Boyd v. U. S.*, 116 U. S. 616.) The popular or received import of words is to be used in the interpretation of statutes. (Potter's Dwarria, 143; *Chamberlain v. West. Tr. Co.*, 44 N. Y. 305, 309; *Maillard v. Lawrence*, 16 How. [U. S.], 251.) The popular or received import of the word "investigation" is that it means a legislative investigation. (*Regina v. Ingham*, 5 B. & S. 257, 264, 270, 274-276; 2 Hans. XVIII, 968, 969, 970, 971, 972, 973, 974; id. XXIII, 1197, 1198; Cushing's Law and Practice of Legislative Assemblies [Boston

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ed. 1866], §§ 983, 1001, Laws of 1869, Chap. 742, § 8.) The previous use of the word "investigation" in the statutes of New York, shows that a legislative investigation was meant to be included in the meaning of the words "any investigation," if, indeed, it was not intended to be the only thing referred to. (Laws of 1848, Chap. 72, § 8; Laws of 1857, Chap. 504; Laws of 1879, Chap. 307.) The Penal Code is a codification and includes in its provisions the act of 1869. (Penal Code, §§ 72, 78; note to section 78, of revisers' report of February, 1879; note to section 80; note to section 81; note to section 79; note to section 85.) The revisers intended that the new signification should be different from the old one, otherwise they would have left it as it was. (*James v. Patten*, 2 Seld. 9, 13, 17; *Rickett v. Met. R. W. Co. L. R.*, 2 H. L. 175, 207; *Rich v. Keyser*, 54 Penn. St. 86, 89.) When, in a general statute, providing for an examination of a witness relating to the matter of bribery, the words "any investigation" are used it means the legislative investigation as well as the other kinds. (*People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 481; *Haydon's Case*, 3 Rep. 7 b.) When there is so far a conflict between a general enactment and some of its subsidiary provisions, that the former would be limited in the scope of its operation, if the latter were not restricted, the latter will be restricted. (Maxwell's Interpretation of Statutes [London ed. 1883], 91, 92; Potter's Dwarria, 144, 231; *Hart v. Cleis*, 8 J. R. 44.)

McKenzie Semple and *De Lancey Nicoll* for respondent. The motion to strike out the evidence of Fullgraff because he admitted that he had sworn falsely on a previous occasion on the same subject, was properly denied. (*Dunn v. People*, 29 N. Y. 523; *Roth v. Wells*, 29 id. 492; *Pease v. Smith*, 61 id. 477; *Deering v. Metcalf*, 74 id. 501; *People v. Petmecky*, 99 N. Y. 421; *Moet v. People*, 85 id. 373; Code Civ. Pro., § 832; Penal Code, § 714; *People v. O'Neil*, 5 N. Y. Crim. L. R., No. 4 [Pamphlet]; *People v. Reavey*, 4 N. Y. Crim. L. R., affirmed, 104 N. Y. 683.) The prosecution had a right to

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trace the bills with which the alderman was bribed in any and every direction, just as in a case of homicide the weapon may be traced for the purpose of showing who its owner was. (*People v. Dunn*, 29 N. Y. 523; *Mosher v. People*, 19 Hun, 625; *People v. Ryland*, 1 N. Y. Crim. L. R. 129; *Lindsay v. People*, 63 N. Y. 143.) There was no error in admitting the testimony of the witness Pottle, to the effect that the defendant Sharp had offered him the sum of \$5,000 to insert the words "Broadway and Fifth avenue" in the general railroad act of 1883. (Best on Presumptions, 309; Wells on Circumstantial Ev. [Am. ed.] 37-45; 1 Starkie on Ev. 491; Burrill on Circumstantial Ev. 281-328; *People v. Coleman*, 55 N. Y. 81; *People v. Corbin*, 56 id. 363; *People v. Gibbs*, 93 id. 470; *People v. Wood*, 3 Park. 681; *People v. Stout*, 4 id. 129; *State v. Baalam*, 1 Stark. 512; *Pierson v. People*, 79 N. Y. 424; *Pontius v. People*, 82 id. 347; *People v. Hope*, 83 id. 423; *Comm. v. Jute*, 105 Mass. 457; Stephens' Dig. Law of Ev., Chase's Note, art. 7, notes 1 and 2; *Comm. v. Tuckerman*, 10 Gray, 173; *Comm. v. Jackson*, 132 Mass. 16; *State v. Lapage*, 57 N. H. 245; *Comm. v. Abbott*, 130 Mass. 472; *Comm. v. Merriam*, 14 Pick. 518; *Comm. v. Schaffner*, 72 Pa. 60; *Comm. v. Bradford*, 126 Mass. 42; *Comm. v. McCarthy*, 119 id. 364; *Comm. v. Choate*, 105 id. 451; *Comm. v. Shephard*, 1 Allen, 575, 581, 582; *Comm. v. McCarthy*, 119 Mass. 354.) The intent was a fact constituting an element, and a substantial element of crime; and evidence tending to prove such intent is competent, although it may tend to prove the prisoner guilty of some other crime. (Whart. Crim. Law [6th ed.], 649; 3 Greenl. Ev. 15; Stephens' Dig. Ev. [May ed.] 56; *Weed v. People*, 56 N. Y. 628; *Weyman v. People*, 4 Hun, 623; *People v. Shulman*, 80 N. Y. 373; *Mayer v. People*, 80 id. 364; *Rex v. Winkeworth*, 4 C. & P. 444; *Botumley v. U. S.*, 1 Story, 135, 143.) Section 6 of article 1 of the Constitution must be deemed to be an affirmance of the common law rule, and construed to mean the same thing as if it, in so many words, provided that no person shall be required to furnish any information which

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may be used as evidence or as a link in the chain of evidence in any criminal action or proceeding against him. (2 Story's Com. on Const. § 1788; *Trial of Aaron Burr*, vol. 1, pp. 212-244; *People v. Mather*, 4 Wend. 252-255; *State v. Quarrels*, 13 Ark. 307-310; *Wilkins v. Malone*, 14 Ind. 153, 154; *Hisdon v. Hard*, 14 Ga. 255, 259; *People ex rel. Hackley v. Kelley*, 24 N. Y. 74; Laws 1853, chap. 539, § 14; *Henry v. Bk. of Salina*, 5 Hall, 523.) This constitutional provision is binding upon legislative committees in the conduct of legislative investigations. (*Emery's Case*, 107 Mass. 172.) A witness must, however, be deemed to have waived such privilege unless he asserts it. (*People ex rel. Hackley v. Kelley*, 24 N. Y. 74; *People v. Mondon*, 103 id. 211.) The indictment need not expressly aver that the defendants committed the offense jointly, or that they acted together, offenses jointly committed being in law several. (*Comm. v. McChord*, 2 Dana, 242, 243; *Bell v. State*, 1 Tex. App. 598; *Johnson v. State*, 13 Ark. 684; *State v. Wadsworth*, 30 Conn. 55; Wharton's Cr. Law [3d ed.], 326.) While this indictment was not for a conspiracy, yet the same rules of law are applicable. (Wharton's Cr. Law [3d ed.], 326; 2 Bishop's Cr. Pr. § 277; Wharton's Cr. Law, § 1398; *Regina v. Frost*, 8 C. P. 129; Roscoe's Cr. Ev. 414; *Leigh's Case*, 2 Campbell, 372; *Brissac's Case*, 4 East, 164.) Declarations of the alleged conspirators, made in furtherance of the conspiracy, are acts, and as such may be introduced for the purpose of proving the conspiracy. (*Rex v. Hardy*, 2 State Trials, 1; 2 Starkie's Ev. 235, 236; Russell on Crimes [5th ed.], 144; *Regina v. Murphy*, 8 C. & P. 297.) The time of admitting evidence of the acts and declarations of others is a mere question of order in the proceedings, which is a matter of discretion with the court. (1 Phillips on Ev. 208; *Hardy's Case*, 24 Howell's St. Tr. 452; 32 id. 341; Taylor on Ev. 594, § 581; *Kelly v. People*, 55 N. Y. 565; *Bruce v. Kelly*, 39 Sup'r Ct. 39; *Place v. Munster*, 65 N. Y. 105; *Cox v. State*, 8 Tex. App. 302; Wharton's Cr. Law, § 1398; *State v. Winner*, 17 Kans. 305; Wharton's

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Cr. Ev. § 698a; 1 Greenl. Ev. 111; *Avery v. State*, 10 Tex. Ct. App. 210; *Hurd v. State*, 9 id. 1; *State v. Miller*, 10 Pacific Rep. 869; *People v. Spies*, 10 West. Rep. Nos. 7, 9.) The communication sent by the mayor to the board of aldermen upon the subject of the Broadway franchise, as well after as before August 30, 1884, and all the proceedings of the board of aldermen in relation thereto, were properly admitted. (*People v. Gardner*, 103 N. Y. 182.) The testimony of sergeants Frink and Mangin as to the effort made by the prosecution to procure the attendance of Keenan, De Lacey and Moloney was competent. (*Pease v. Smith*, 61 N. Y. 477.)

George F. Comstock for respondent. The resolution of the senate directing an investigation as to the Broadway road was unauthorized and Sharp's testimony before it must be regarded as given voluntarily, and, therefore, admissible on this trial. (State Const. art. 1, § 1; art. 4, § 4; art. 6, § 19; *Kilbourn v. Thompson*, 103 U. S. 168, 196; U. S. Const. art 2, § 1; art 3, § 1; Penal Code, § 79; Broome's legal maxims, 201, 450.)

DANFORTH, J. The indictment was found October 19, 1886. In substance it accuses Jacob Sharp and six other persons of giving and offering and causing to be given and offered to one Fullgraff, a member of the common council of the city of New York, \$20,000, with intent to influence him in respect to the exercise of his powers and functions as such member of the common council, upon the application of the Broadway Surface Railway Company for the consent of the common council to the construction of a street railway. Sharp was tried separately. Direct evidence was given from which a jury might find that Fullgraff had in fact been bribed, and other evidence altogether of a circumstantial character and by no means conclusive, but sufficient, as the jury have said by their verdict, to warrant a finding that Sharp was concerned in the commission of the crime, and therefore guilty of the offense charged. Exceptions were taken in behalf of the

defendant to several decisions of the trial court in admitting against his objection certain items of testimony, which it is conceded were material, and without which it is claimed by the appellant a conviction could not or might not have been obtained. *First.* Among others the counsel for the prosecution proved that the defendant was examined as a witness before a committee of the senate of this State, appointed to investigate among other things, the methods of the Broadway Railway Company in obtaining such consent, and also the action in respect thereto of the board of aldermen of said city, which granted, or of any member thereof who voted for, the same, and that he upon that occasion gave testimony which the learned counsel for the prosecution claimed to be "irrefutable evidence of his participation and complicity in the commission of the crime." This testimony the prosecutor offered in evidence. It was conceded by the prosecution that at the time he testified the defendant was before that committee under the operation and compulsion of a subpoena duly issued by the committee, and that the testimony he gave was in response to questions propounded in their behalf. Its admission on the trial was objected to on the ground that it was given under privileged circumstances; that the defendant was compelled to attend and testify, and that evidence thus elicited was not competent "upon the trial of a person where the subject under inquiry is that about which he was then interrogated."

The question before the jury was whether the defendant had committed the crime of bribery as alleged in the indictment, and as that offense is declared by section 78 of the Penal Code, under which the indictment was found. This section forms part of title 8 which relates to crimes against public justice, and of chapter 1 of that title concerning bribery and corruption. It is preceded by other provisions concerning bribery as (§ 44) of an executive officer (§ 66) of members of the legislature (§ 71), of a judicial officer (§ 72), of such an officer accepting a bribe (§ 74), of a juror, and embracing all these as well as the provisions of section 78, section 79 declares that (1) a person offending against any provision of any fore-

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going section of this Code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation in the same manner as any other person. (2.) "But," it declares, "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying." (3.) A person so testifying to the giving of a bribe which has been accepted, "shall not thereafter be liable to indictment, prosecution or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution." By a subsequent section (§ 712 of the Penal Code) these provisions are so modified as not to permit such evidence being proved against the witness upon any charge of perjury committed on such examination.

The first question upon this appeal is as to the meaning and spirit of the statute contained in this section. (§ 79.) The appellant contends that by it the disclosures made by him before the senate committee were privileged and could not be used against him on the trial now under review, and one of the learned counsel for the People concedes that this force might be attributed to the statute if it were wholly a valid enactment (as he contends it was not), and if the evidence given before the committee had not been entirely free and voluntarily (as he contends it was). These propositions lie at the bottom of the controversy.

1st. Is the enactment valid? The learned counsel for the People contrast the constitutional provision, "that no person shall be compelled in any criminal case to be a witness against himself" (art. 1, § 6), with the compulsory words of section 79 already quoted, and pronounce one to be "the direct opposite of the other," and as we understand the argument, it is that the constitutional exemption is absolute and complete, permitting the witness to lock up the secret in his own heart, and does not permit the evidence to be taken from him at all; that this right is infringed by the provisions of section 79, and that it is therefore invalid. It is I think an answer to

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this proposition that the same section declares not only that the testimony given by the witness shall not be used in any prosecution or proceeding, criminal or civil, against him, but that the very fact of so testifying may be pleaded in bar of an indictment or prosecution for the giving of a bribe which has been accepted. It should be borne in mind that the sole object of the introduction of the defendant's testimony was to prove from it that he was guilty of giving the bribe, which, as the evidence tended to show, Fullgraff accepted, and the giving of which was the sole accusation against the defendant. If then the case is within the terms of the section, as upon this point it is assumed to be, the immunity offered by it distinguishes the statutory provision from the constitutional inhibition, inasmuch as it indemnifies or protects the witness against the consequences of his testimony. To that effect is the decision of the Court of Appeals in the case of *People ex rel Hackley v. Kelly* (24 N. Y. 74). The court there had under review an order adjudging the relator Hackley guilty of contempt in refusing to answer before the grand jury questions quite similar in substance to those propounded to Sharp by the senate committee. The complaint under examination was against certain aldermen and members of the common council of the city of New York, for receiving a gift of money under the agreement that their votes should be influenced thereby in a matter pending before them in their official capacity, and Hackley as a witness was asked as to the disposition made by him of a certain pile of bills received from one H., and said to amount to \$50,000. Hackley asserted his privilege at common law and under the constitution, and demurred to the question. The Court of Sessions adjudged him guilty of contempt for refusing to answer, and ordered him to be imprisoned. The Supreme Court affirmed the order, and the Court of Appeals affirmed the decision. The principal question discussed by this court was whether the relator could lawfully refuse to answer the interrogatory, and in reaching its conclusion the court examined the provisions of chapter 539, of the Laws of 1853, entitled

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"An act to amend the existing law relating to bribery," and also chapter 446 of the Laws of 1857, amending the charter of the city of New York. Both acts relate to bribery. We shall again refer to them and it is sufficient in this connection to say that each act contains provisions compelling the attendance and testimony of witnesses, but provides full protection against the use of their testimony in any proceeding, civil or criminal, against the person so testifying. The object of these provisions was said to be to enable the public to avail itself of the testimony of a participator in the offense and to enable either party concerned in its commission to be examined as a witness by the grand jury or public officer entrusted with the prosecution, and the court held that the relator was not privileged by the Constitution, inasmuch as he was protected by the statute against the use of such testimony on his own trial.

The learned counsel for the People also argues that the statutory protection afforded by section 79, does not go far enough; that the indemnity it offers to the accused witness is partial and not complete; that while it may save him from the penitentiary by excluding his evidence, it does not prevent the infamy and disgrace of its exposure. This argument is also met by the opinion in the *Hackley Case* (*supra*). It was there argued for the relator that he was not wholly protected; that his testimony might disclose facts and circumstances which, being thus ascertained, might be proved against him by other testimony than his sworn evidence. But the answer of the court covered not only that supposed case, but the objection that the disgrace of exposure would still remain, although the evidence was not used. "That," said the court, "is the misfortune of his condition, and not any want of humanity in the law." "If a witness," said Judge DENIO (24 N. Y. 83), "object to a question on the ground that an answer would criminate himself, he must allege in substance that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense," adding, "if the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive

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statute, I have seen no authority which holds or intimates that the witness is privileged." The conclusion of the court was that the relator was not exempt from testifying, and it follows from the decision then rendered that the provision of the Code which embodies the same conditions as those then under consideration, is in no sense repugnant to the Constitution.

2d. Was the testimony of Sharp given of his own will, or by compulsion? He would, as the prosecution concedes, have testified against himself if as a witness on his trial he had sworn as he did before the committee; but he was not sworn upon his trial and this fact they say left him to the operation of the common law rule, when his admissions made elsewhere and in another place where sought to be proved by other witnesses. To reach this conclusion it is argued with great earnestness by one of the learned counsel for the People, "that the resolution of the senate and the inquisition of the committee were illegal and void proceedings, having no significance or force in the judgment of the law." "To say," continues the counsel, "that Mr. Sharp was a witness implies a court or magistrate authorized to administer the oath and take the evidence," and his claim is that Sharp was "under no compulsion of law to be present at this inquisition, to take an oath, or to testify." In the view of the learned counsel for the prosecution and as characterized by him, "the sittings of the committee were merely meetings of private persons, among whom was Mr. Sharp." "There were," he says "conversational questions and answers in which he (Sharp) took a part by answering interrogations addressed to him," and the contention of the learned counsel follows, "that Sharp's statements on that occasion may be used in any proceeding to which he is a party." If the premises were true, this construction might in ordinary cases follow. But if they are correct, the courts below seem to have misconceived the situation in which Sharp was placed, for we cannot find in the voluminous record before us any suggestion that the senate had not full power to take cognizance of, and to inquire through its committee into the alleged abuses of public

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power and the corruption of public officers, nor that such proceedings in the present case, having in view the possible necessity of an alteration in the existing law, were not in every respect valid and legal. Nor are we left to this negative evidence that such question was not raised upon the trial. It appears by the concession there made and already quoted, that upon objection being made to the introduction of Sharp's testimony, on the ground that his statements before the committee were privileged, made under compulsion of a subpoena and the constraint of an oath duly administered by the committee, who confined his evidence to such questions as the committee chose to ask, the prosecution not only made the admission already set out, but also required the resolution under which the committee assumed to act to be put in evidence and so connected with the admission. That being done, the prosecution went into evidence of the acts of Sharp, to show that he waived his privilege before the committee by not asserting it; in no manner questioning the due appointment of the committee nor its powers. In view of these facts it is too late to raise the question here. Moreover, the decision in the case of *People ex rel. McDonald v. Keeler* (99 N. Y. 463), establishes, so far as this court is concerned, that the senate had constitutional power to pass the resolution, and that its committee was authorized to carry it into effect. In that case it appeared that charges of fraud and irregularity had been made by the public press and otherwise against the commissioners of public works in the city of New York, and the senate, by resolution, directed its committee "to investigate" that department, with power to send for persons and papers, and report the result of its investigation and its recommendations concerning the same to the senate. The relator was summoned and appeared and testified, but refusing to answer certain questions, was, on the report of the committee, committed by the senate for contempt. Upon *habeas corpus* questions as to the constitutional power of the senate to order the investigation and legality of its proceedings, were distinctly presented and affirmed.

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The case on which the learned counsel for the People now places his argument (*Kilbourn v. Thompson*, 103 U. S. 176), was cited in favor of the prisoner, fully commented upon by the court, and shown to have no application. The action of congress reviewed in that case was in substance a creditor's bill, or effort to impeach a transaction already closed between the United States and one of its debtors. The Supreme Court of the United States held that as to it congress had no judicial power, and exceeded its authority in the attempted investigation. The *McDonald Case*, on the contrary, reviewed a proceeding which was necessary or appropriate to enable the legislature to perform its functions, and it was held to be no objection that it partook in some degree of a judicial character. That case brought up proceedings on all substantial points, like the resolutions which were at the bottom of the inquiry before the senate committee in this case, and its decision makes any further discussion of their validity quite unnecessary. It follows that the investigation before the committee was not beyond its powers, nor were the resolutions under which they acted void, or without legal significance or force. As, therefore, it cannot be said that the committee was without power to compel the witness and require his testimony, the respondent must find elsewhere reasons, if there are any, in support of the proposition that the evidence was by a willing witness. To that end it is further said, in behalf of the People, that Sharp, by not asserting his privilege before the committee, waived it. But if the case comes within the purview of section 79 (*supra*) of that act, the senate subpoena and the resolution of the senate were compulsory, and it was not necessary for the protection of the witness that he should, either by deed or word, set either at defiance, or refuse to obey the summons, or refuse to answer the questions of the committee. It is enough if he was obliged by law to answer the inquiry, and he could not be required, in order to gain the indemnity which the same law afforded, to go through the formality of an objection or protest which, however made, would be useless. In the *Hackley Case* (*supra*), the witness

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did plead his privilege, but it was of no avail, because he was obliged by law to answer the inquiries, and the law was held imperative and sufficient, although the case was one within the very terms of the Constitution, because by the same law he was protected against the consequences of his admissions. Whether he asserted his privilege, or whether he was silent and submissive to the laws, could make no difference. The legislature, for reasons of public interest, required a discovery of the whole truth as to matters involved in their inquiry. And one answering in compliance with their command cannot be deemed a willing or consenting person within the meaning of the maxim, "*volenti non fit injuria*," on which respondent relies. A person who yields from the necessity of obedience cannot be said to have the power of acting by his own choice. And where the law says he shall be compelled to attend and shall be compelled to testify, acquiescence is not election, and he is not one of whom it can be said he receives no injury from that to which he willingly and knowingly agrees and consents. There can be no volition where there is neither power to refuse nor opportunity to elect. Under such circumstances the witness must be deemed to speak for the safety of his person, and in view of the indemnity which the law promises. A man is none the less robbed because, yielding to irresistible power, he makes no resistance; and a witness who gives up his secret at the command of the law is as much under compulsion as if he ventured on the punishment that would follow on his refusing to disclose it. In the *Hackley Case* there was the plea of privilege, but it availed nothing because the law required an answer. The position of the witness was in no respect changed by the plea. In the *Keeler Case* (*supra*) there was refusal to answer under the advice of counsel, but it availed nothing. To refuse to attend the committee or testify would, moreover, have rendered the witness guilty of a misdemeanor. (§§ 68, 69 of the Penal Code). It seems to us that the evidence of Sharp before the committee was given under the penalty of commitment and imprisonment for contempt, and consequently that it was obtained from him by com-

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pulsion. So far, we have assumed the case to be within the provisions of section 79 of the Penal Code (*supra*), and we come now to the contention on the part of the People, that the section (79) does not embrace such investigation, but, on the contrary, is to be limited to such testimony only as might be given upon "trial, hearing, proceeding or investigation in the course of a criminal prosecution, and that it has no application to such testimony as might be given in the course of legislative proceedings or investigations." It was held in *People v. Keeler* (*supra*) that the senate might proceed in its own way in the collection of such information as might seem important in the proper discharge of its functions; and whenever it was deemed necessary to examine witnesses, that the power and authority to do so might properly be referred to a committee with such powers as should appear to be necessary or expedient in the case; and that, notwithstanding the vesting of judicial power in the courts, certain powers, in their nature judicial, belong to the legislature and might be delegated to a committee authorized to take testimony and summon witnesses, and that a refusal to appear and testify before such committee, or to produce books or papers, would be a contempt of the house. It was also held that when institutions or public officers were ordered to be investigated, it is to be presumed that such an investigation was with a view to some legislative action in regard to them; and, moreover, that the terms of the resolution directing it may be looked at to ascertain the legislative intent. The resolutions which led to the examination of Sharp were passed January 26, 1886. They were preceded by a reference to the provisions of the Constitution and statutes relating to street railroads, and the prohibition against such road without "the consent thereto of the local authorities having control of the street upon which it was proposed to construct the road," and a reference to the charges that consent to the railroad upon Broadway, "was obtained through fraud and by and through corrupt influence and bribery of such authorities," viz.: The aldermen of the city of New York, and a recital that a strong

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and reputable sentiment in that city demands, at the hands of the Senate, "an investigation of the methods in obtaining such consent." It was for these reasons resolved by the senate that its railroad committee be authorized "to investigate fully all matters relating to the methods of the Broadway Surface Railroad Company, or of any other person or corporation relating to, or in obtaining such consent, and also to investigate fully the action of the board of alderman of said city, which granted or gave the same, in respect thereto, or of any member thereof who voted for the same, in respect thereto."

The committee were given full power to prosecute such investigation in such directions as it thought necessary, as to all matters relating to the granting of said consent and the inducements which led thereto, with full power to send for persons and papers and to employ counsel and other assistants in the work before them, and the sergeant-at-arms was directed to attend the sittings of the committee, serve subpoenas and do such other things as it directed. A report was required, with recommendations, and particularly as to the policy of an amendment to the Constitution, vesting the power to grant such consent in some other authority than as at present provided." It is apparent from their terms that the resolution which permitted the examination of Sharp involved an inquiry which the legislature had a right to make, and which, in view of the recitals in the resolution, it was its duty to make in order that the abuses which were disclosed might be cured by further action by the legislature or by the People. The inquiry was judicial in its nature, was to be pursued for a lawful end and by means as comprehensive and sufficient as could be provided. The occasion and the action of the legislature meet every suggestion of the court in the case last cited as to the expression of legislative intent and the imposition of the duty of obedience upon all persons who should be summoned to make, by their testimony, the investigation serve the ends of public justice.

We have seen that there is no conflict between the will of the legislature as expressed in section 79 and the Constitution, and we are now to construe that section in accordance with

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the legislative intent. In its exposition full effect is to be given to that intention, and if possible full force and validity to every word, so that no part be annulled or rendered nugatory. It cannot be doubted that the case is brought literally within the language of the section (§ 79, *supra*). Sharp was a person offending against one of the specific provisions of the Code in relation to bribery. He was accused, and has been convicted of giving a bribe. He was, therefore, qualified under that section (79) as a "competent witness." Against whom? Why, against another person "so offending," that is, another person offending against any of those provisions of the Code "relating to bribery." He was, in fact, a witness before the committee in relation to bribery. Was he a witness against another person? The resolution recites, as the immediate cause of the action of the senate, the alleged bribery of certain "local authorities consenting to the railway," and then to make the accusation specific as to the person, says, "the local authority" referred to as the authority which consented, "was the aldermen of said city." There was, then, another person offending.

Sharp was, by the statute, made competent as a witness as to the subject-matter against him. The legislature may be presumed to know that such a person, although made by law competent as a witness against that other person, would even then testify, if at all, voluntarily and to his own crime, and, therefore, would not be likely to testify at all, and so they not only make him a competent witness, but add, "and" (he) "may be compelled to attend and testify," meaning, of course, to give evidence against that other person, including at any rate the other party to the transaction. If, as in the case before us, the "person offending" is the giver of the bribe, then he might be compelled to testify against the receiver of the bribe. Where? Why, upon any trial, upon any hearing, upon any proceeding, or "upon any investigation." It follows that if we adhere to the ordinary and natural meaning of these words and apply them to the case in hand, we shall find neither

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inconsistency nor incongruity, but complete adaptation. The senate was dealing with the charge made against the aldermen of the city, that their consent was obtained by and through certain methods, and, among others, bribery; it admitted that an investigation of those methods was demanded; therefore, the senate authorized its committee "to fully investigate" all matters relating to these methods, and also to investigate fully, not only the action of the board of aldermen which granted or gave such consent, but also that of any member of the board, with full power and authority "to prosecute its investigations in any and all directions in its judgment necessary to a full and complete report to the senate as to all matters relating to the granting of such consent and the influences and inducements which led thereto," and gave to the committee full power and authority to send for persons and papers, to hold its sessions in New York and conduct its "investigations" there. Clearly there is to be an investigation, in the language of section 79, of a charge of bribery of a public officer, with an intent to influence him in the exercise of his powers. The committee were to ascertain, through testifying persons and papers, whether the charge was well or ill-founded. Whoever gave evidence before them attended upon an "investigation" and testified, and unless we greatly confine and limit the meaning which the words used by the legislature usually express, it is impossible to say that the case is not within the statute. It is claimed, however, by the learned counsel for the People, that the "investigation in the mind of the legislature did not include an investigation directed by itself and conducted through its committee, but only an 'investigation' in the course of a criminal prosecution, and upon that construction the judgment of the court below was put. It is no doubt the duty of the court to restrain the operation of a statute within narrower limits than its words import, if it is satisfied that giving to them their literal meaning, the statute would be extended to cases which the legislature never intended to include. But this can only be done where a reason for some limitation is found, either in the occasion for which they are used, or in the

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context. That is not the case here. In the first place the construction contended for in behalf of the People is contrary to the plain and ordinary meaning of the words used. "Any investigation" would include all investigations in the conduct of which persons may be called by authority, as witnesses to testify under oath concerning any matter. Therefore it must include, if taken literally, the action of a legislative committee according to the direction given it, and acting with authority to subpoena witnesses, and enforce their attendance, and examine them upon oath. Nor is it any answer to this conclusion to say that only a judicial investigation was intended. If we are right in the views above expressed, the legislature possessed, and might delegate to its committee any power short of final judicial action, which they thought necessary in any particular case, and although the investigation was only for the collection of information required for the proper performance by the legislature of its own functions, it might nevertheless be a proceeding requiring witnesses and power to compel their attendance. It is, moreover, assumed and claimed by the prosecution that the privilege of a witness to be exempt from a compulsory disclosure of his own criminal conduct, is the same in such an examination as when sworn in court. If that be so, it affords a sufficient reason for including a legislative investigation among the proceedings in which persons otherwise privileged should be compelled to testify. Public policy would often require the fullest disclosure, and the very case before the legislature was an instance in which that policy might be defeated if the utmost latitude was not permitted, and the greatest freedom of examination to ascertain the truth of the public charge that a great and valuable franchise had been obtained through corruption and bribery of public officials.

In *In re Falvey* (7 Wisc. 630) it appeared that in pursuance of a resolution of the legislature of Wisconsin, not unlike that before us, having for its object the investigation of frauds, bribery, and corrupt acts, charged to have been perpetrated by inducing the legislature to grant certain lands, and the investi-

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gation of cases of alleged bribery on the part of certain railroad officials and others in procuring the grant, a committee was appointed with powers similar to those conferred by the resolution before us. One Falvey was subpoenaed before the committee, but refused to answer, and on *habeas corpus* it was adjudged that he could claim no privilege, and his refusal to answer was a contempt, because the law of that State provided that no person so examined and testifying before a committee so appointed should be held to answer in any court of justice, or be subject to any penalty or forfeiture for any fact or act touching which he should be required to testify. It was held that this language furnished a full protection. No such provision relating to the offense of bribery is found in any statute of this State prior to 1869 (Chap. 742, Laws of 1869), but the legislation on the subject extended from time to time, until consolidated and enlarged in the Penal Code. The provisions of the Revised Laws (Vol. 2, p. 191, § 3) were made part of the Revised Statutes (R. S. vol. 2, tit. 4, pt. 4, Chap. 1, art. 2, § 9, p. 682) and related to the bribery of certain state officers, judges of any court of record and judicial officers. Section 10 of the same article related to the acceptance of a bribe by either of these officers; section 11 related to the acceptance of bribes by jurors, arbitrators and referees, and section 11 to persons who should, by gifts, corrupt or bribe them. In 1853 (Laws of 1853, chap. 217, § 14), by the act amending the charter of the city of New York, and above cited, a penalty was imposed for bribing any member of the common council or other officers of that corporation, and it was provided that every person offending in that respect should be a competent witness against any other person offending in the same transaction, and might be compelled to appear and give evidence before any grand jury or in any court in the same manner as other persons, but declared that "the testimony so given should not be used in any prosecution, civil or criminal, against the person so testifying." In the same year (Laws of 1853, chap. 539), the provisions of the Revised Statutes (*ante*) were

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amended and added to; other officials were enumerated as the subjects of bribery, and among them "any member of the common council or corporation of any city," and any person offending against either of the provisions of the preceding sections, was declared to be a competent witness against any other person so offending, and might be compelled to appear and give evidence before any magistrate or grand jury, or in any court, in the same manner as other persons, but it provided that testimony so given should not be used in any prosecution or proceeding, civil or criminal, against the person so testifying."

The act of 1857 (§ 52, *supra*), is confined to the city of New York, and relates only to bribes offered or given to members of its common council or officers of the corporation, makes every person offending against any of the provisions of that section a competent witness against any other person offending in the same transaction, and closes with an absolution or saving clause similar to that of the act of 1853, last cited.

In 1869 (Laws of 1869, chap. 742), an act was framed for "the more effectual suppression and punishment of bribery." It authorized certain actions in favor of parties injured, and by section 8 provided as follows: "No person shall be excused from testifying on any examination or trial for any offense specified in this act, or the trial of any action authorized by this act, or on any *investigation* by any committee of the legislature, or either house thereof, into the conduct of any member thereof, or on the trial of any civil action for slander or libel, or any criminal action for libel where such alleged slander or libel imputes bribery, or any offense mentioned in this act, or on the trial or examination of any charge of perjury, committed in evidence given upon any such trial or *investigation*, on the ground that his testimony will tend to disgrace him or render him infamous, or will tend to convict him of a criminal offense, or render him liable to be proceeded against therefor. But the testimony given by such witness on such trial or *investigation* shall not be used against him on the trial of any action, civil or criminal, against him. And nothing herein shall be construed as compelling any person to testify

in any proceeding or trial in which such person is charged with crime."

Keeping in mind the compulsory and the protecting parts of the foregoing statutes, we come to the statute of 1881 (chap. 676), which establishes a Penal Code and which, so far at least as the crime and proof of bribery is concerned, is in part a codification of preceding enactments. So far as the various provisions of these acts make the offender a competent witness and relieve him from prosecution, they are formulated in section 79, already quoted. (Penal Code, § 79.)

It is apparent from this history of progressive legislation that the word "investigation" cannot be treated as a word of mere amplification to broaden the sense of preceding words, but must be deemed the deliberate expression of an intent on the part of the legislature to bring in a distinct class of cases. Can there be any doubt as to the meaning of the legislature in the corresponding clause of preceding statutes? In that of 1853 (chap. 217), requiring the party to give evidence before "any grand jury in any court," or, in chapter 539 of the same year, "before any magistrate, grand jury, or in any court," or in the act of 1869 (*supra*), "on any examination or trial, or on any investigation by any committee of the legislature, or either house thereof, into the conduct of any member thereof." Each successive statute goes further than the preceding, one not including an examination before a magistrate, another including it, both obviously confined to examinations in the course of criminal procedure, but the last (1869) bringing in a new species, that of legislative investigation for a certain end, and of a certain described class. But other investigations than those relating to the conduct of its members were frequently entered upon or ordered by the legislature to be made through its committee, in pursuing which, testimony from witnesses was required, and we see no reason to doubt that the legislature intended by the provisions of section 79 to cover all such cases, as well as those formerly provided for, when they involve an inquiry into matters relating to bribery as defined by the various sections of the Penal Code,

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above referred to. The plain object of that statute was to enable these various tribunals, whether magistrates, grand juries, courts or legislature, to make their investigations into alleged abuses effectual, and enable them to prosecute their inquiries successfully, and to that end protect witnesses whose testimony might otherwise be withheld, but without which the investigation would fail. No reason has been suggested for confining that protection to witnesses other than those who appear upon legislative investigations, and we are not permitted by any rule applicable to the construction of statutes to give the section in question such limitation as will exclude them. It could only be done by inference and by importing into the statute words which the legislature did not choose to employ, and which express a meaning very different from the words actually used. This we are not at liberty to do. "What else," asks a learned judge, "is restraining by inference or varying by interpretation but to a certain extent recasting and remodeling the statute, or, in other words, invading the province of the legislature itself." (WILLIAMS, J., in *Garland v. Carlisle*, 4 Cl. & Fin. 726.) It certainly should not be permitted where the object of the act under examination was to extend the policy of existing statutes to new cases, and enlarge and not restrain its application, nor where the intention of the legislature is clearly expressed in words deliberately chosen, and where a literal construction does not take them beyond the mischief at which they were aimed. The case before us is not only within the words, but within the spirit of the statute, and we are unable to find any doubt or ambiguity in its language which should deprive the defendant of a construction according to the manifest import of the words actually used.

We have not overlooked the contention of the respondent "that sections 68 and 69 of the Penal Code, making the refusal of a witness to attend or testify before a legislative committee, a misdemeanor," limit the inquiry to "material and proper questions," nor the argument thereupon that a question which calls for a "criminating answer," is not a

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proper question and the witness not obliged to answer. But we think that whatever effect may be given to these sections, they cannot be regarded as excluding the operation of the subsequent sections (78, 79) which deal with the offense of bribery and provide with minuteness for its punishment and the means of its discovery. The actual attendance of the witness, and his disclosures are provided for, and it is clear that to make an investigation upon the subject of bribery effectual there must be some way of compelling both. Within the scope of those sections every question may be asked which is "pertinent" to the subject-matter, and whether it is or not pertinent will be the only question. The statute relieves the witness, and it will not be necessary for the examining or investigating tribunal to concern itself with the effect upon him. If this were not so the whole object of the legislature might be obstructed by the neglect or refusal of witnesses to obey the subpoena or answer the questions of the committee. That those put, on the investigation, the results of which are now before us, were pertinent, is apparent from the use made of the answers thereto upon the prosecution of the person who then testified. If the observations already made are correct, it follows there was error in receiving them against his objection.

Second. Another exception brings up the ruling of the court as to evidence from one Pottle, proving a corrupt proposal by the defendant in 1883. The witness was at the time engrossing clerk of the assembly, and the defendant desired an alteration of a certain bill then pending before that body in reference to street railways, so that its terms might authorize the construction of a railroad on Broadway. For this alteration he proposed to pay the witness \$5,000. We are unable to find any ground on which the evidence was admissible. It was introduced as part of the affirmative case which the prosecution were bound to carry to the jury. Its admission is justified upon this appeal by various propositions presented by the People. First, say the learned counsel: "We suppose that every criminal trial begins with a presump-

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tion of innocence in favor of the accused. This presumption must be founded on the moral rectitude or fear of the law, or both, whichever the person is supposed to possess. The presumption must be overcome before conviction can be had. Jacob Sharp was accused and brought to trial for bribing the aldermen of the city of New York, and by that means procuring the grant of a valuable right. Evidence was offered to show that not long before he had attempted to bribe another official person to do an act, which, as he thought, would promote the scheme which he had so long pursued. This evidence being given proved beyond a question that no sense of right and wrong, no fear of law or punishment, would deter him from committing the offense of bribery for the one purpose which he had in view in all his efforts." * * * "The evidence objected to proved the irresistible strength of the motive as against all other motives which might have deterred him and upon which the presumption of innocence is founded."

This view cannot be sustained; the commission of a crime by Sharp in 1884, was distinctly in issue. It was bribery, but the subject was Fullgraff, a member of the common council. Of the commission of that crime the law presumed Sharp to be innocent. If Sharp had given evidence of good character the prosecution might have answered that evidence by proof that his character was bad, but I believe it has not been thought by any judicial tribunal that such evidence could be given in anticipation of proof from the defendant, nor that an issue upon it could be tendered by the prosecution. (*People v. White*, 14 Wend. 111; *Webster's Case*, 5 Cush. 295; *De Witt v. Greenfield*, 5 Ohio, 227; *Com. v. Hopkins*, 2 Dana, 418; *Burr. on Cir. Ev.* 533.) But even in the case I have supposed such evidence would be of general reputation only, and not of particular acts by which reputation is shown.

The effect of the argument for the People is that the evidence shows a disposition to commit the crime, that is a criminal disposition. If that is a different view it is equally

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inadmissible. A man's general character may perhaps be so bad as to permit an inference that evil and good have to him the same meaning, and that it is a matter of indifference by which he accomplishes his purpose. In a judicial proceeding, however, proof of that would be irrelevant, although it might show, in a moral sense, that he would be likely to commit the crime with which he was charged. The person charged might as well seek to repel the imputation by proof of particular acts performed by him at other periods of his life, and a cause submitted to a jury be made to turn upon the preponderance of proof, on one side of antecedent bad conduct, and proof on the other of virtuous acts. Legally speaking, it would be unsafe to draw a conclusion from either. We are referred to no case holding that upon the trial of an indictment charging a specific crime, committed in a specific way, evidence that the accused was of a particular character would be relevant. Moreover, counsel on both sides seem to agree that the commission of one crime is not admissible in evidence on the trial of the same offender for another crime. It is indeed elementary law that no evidence can be admitted which does not tend to prove the issue joined, and the reason and necessity of the rule are much stronger in criminal than in civil cases for the observance of this rule and of confining the evidence strictly to the issue. The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of evidence of another and extraneous crime is calculated to take the defendant by surprise and do him manifest injustice by creating a prejudice against his general character. How then is this case to be taken out of this general rule of law? The learned judge, in submitting the case, desired the jury to consider the Pottle evidence "as only showing the zeal which the defendant exhibited," and not allow themselves to be prejudiced by his testimony in regard to the offer of a bribe, saying, "It is only to be considered as showing, like other evidence in the case, the extent of the defendant's feeling, interest and desire," adding, "I should be sorry if the fact that Pottle testified to the offer of a bribe, should be otherwise consid-

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ered. * * * So far as it tends to throw any dark shadow upon the character of the defendant, I desire you to eliminate it from your consideration and treat it merely as evidence tending to show depth of interest, motive and desire."

These remarks not only answer the respondent's argument, but point to the danger which might follow from the evidence. They were obviously inadequate to prevent it. Nor does the discrimination between crime proven and a conversation, make the evidence less objectionable. As presented to the jury it was distinctly a crime committed. The point of inquiry was that, and it was plainly so avowed by the counsel for the People. He brought the witness Pottle and Sharp together; proved by him that he then had the "general surface railroad act in his possession as engrossing clerk;" that he had a conversation with Sharp "in relation to the bill;" that he had a conversation with him "on the subject of the bill including or not including Broadway as one of the streets in the bill." Then asked, "had you any conversation with him as to whether he did or did not desire to have Broadway included as one of the streets in the bill." The defendant's counsel objected, but the objection was overruled and an exception taken, and the witness replied, "I did." He was then asked to state "all he (Sharp) said on the subject," and the counsel for the defendant asked "to be informed to what point the evidence is to be directed," saying "there is a particular purpose in this question and I think we might properly be advised what it is." After some discussion the district attorney said, "I intend to prove that Pottle was sent for by this defendant; that he went to defendant's room; that this defendant thereupon offered Mr. Pottle the sum of \$5,000 to add to one of the sections of that bill the words 'Broadway and Fifth avenue,' permitting a horse railway company to be constructed upon those streets; that Pottle declined the proposition, and that Sharp then offered the same sum in case he would give him the original bill; that is what I desire to prove;" whereupon defendant's counsel said, "we object to it upon the ground that it is evidence of an utterly distinct

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charge of crime." The court said, "upon the whole my judgment is that the evidence is admissible."

A careful examination of the evidence given by Pottle authorizes the comment of the appellant's counsel that "it was not part of the conversation, but that it was the whole." Unless admissible as proving an attempt to commit a crime, it is wholly immaterial, and, as proof of a crime, it was irrelevant, and must have been very prejudicial to the defendant. It showed a capacity or willingness to commit bribery in 1883, to induce an act from which Sharp might be benefited as one desiring the construction of the road, but which, in fact, gave him no advantage over other citizens. It gave him no franchise; but it could not fairly be inferred from such premises that, in 1884, he did also bribe a different person for a different purpose. The inference would be purely conjectural. The mental ability and disposition of the defendant to commit a crime of this sort, while it might persuade a jury, raises no legal presumption. It is not moral evidence even. The fact under investigation, in its circumstances, was entirely unlike the fact disclosed by the witness. There is no analogy between them. Yet the inference drawn by the prosecuting officer, and permitted by the court, left it for the jury to say that the desire of Sharp manifested by the offer of a bribe in one instance, was the same desire which led to the actual giving of a bribe in the other, hence, that the two crimes had the same origin. Evidence of moral character is admitted to disprove the existence of a criminal motive, or to rebut evidence of it; but evidence of a prior crime can have no legitimate place in an investigation as to whether a subsequent crime was committed by the same person. If it had been proven that Sharp had in fact given the money to Fullgraff, and the question was as to its being an innocent or criminal act, a gift which he had a right to make, or which he made corruptly, the fact, if it were a fact, that he sought to attain a similar end by bribery, might seem to show the intent with which the act charged was done. But here the very thing in dispute was whether he gave the money, and that upon a former and dif-

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ferent occasion he had offered money with a guilty purpose to another person, could not fairly be held as relevant to that question. Moreover, it had been distinctly conceded by the defendant that he desired to secure the franchise for the Broadway Surface Railroad, and, therefore, evidence of his commission of a crime for the mere purpose of showing that desire, was wholly unnecessary, and we may repeat here the language of ALLEN, J., in the *Coleman Case* (55 N. Y. 81) upon a similar question: "It was idle and frivolous to put in this evidence for the purpose avowed, while its influence could not be otherwise than damaging to the prisoner." It was put in near the beginning of the trial and the impression then made must have continued with the jury and, in their minds, colored and deepened, if it did not distort the subsequent evidence.

It did, indeed, cast a dark shadow upon the defendant's character—it not only tended very strongly to prove the defendant guilty, it was absolute proof, but it was of a different crime from that charged. It was offered and received directly on the main issue and was of great and persuasive force against him. Such evidence is uniformly condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought and to excite prejudice and mislead them. It was, we think, improperly received and the exception to its admission well taken.

Third. We are also of opinion that there was error in the examination of the witness Miller. He was an alderman at the time of the passage of the resolution, but we do not find he was a party to any agreement concerning its passage. Against the objection of the defendant he was allowed to testify that after the "consent" was given he received from De Lacy \$5,000. The district attorney then asked: "You understood, did you not that you received that money from De Lacy on account of the Broadway Surface Railroad?" A. "No, sir; nothing of the kind." A further examination as to the circumstances and the time of its receipt followed, and the witness said De Lacy gave me a roll of bills "and said

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there is something to buy election tickets with." Asked by the district attorney: "Did you not understand at the time, it was paid on account of the Broadway Railroad Company?"

A. "No, sir; I had no understanding of that kind with him."

Q. "What was your understanding at the time?" To this question there was not only the specific objection that the evidence asked for was incompetent against Sharp, but the further objection that it was asking for a conclusion." The court allowed it and the defendant excepted. A. "There was no particular understanding about it so far as I was concerned."

"There was nothing said about it." Q. "What did you think, at the time, De Lacy gave it to you for?"

The court held this competent. Witness: "What did I think?" District attorney: "That is the question asked you."

A. "About what?" District attorney: "As to what De Lacy gave it to you for?"

A. "Well I had my misgivings." District attorney: "Tell us what did you think at the time what he gave it to you for?"

Witness: "I supposed it was for the Broadway road." It is quite impossible to find any ground on which the exception taken can be overcome.

The transaction was not with Sharp. The question called for no fact, but with frequent iteration for an opinion, a supposition.

Its importance in the estimation of the People is manifest from the repeated and persistent attempts to obtain it.

The court below were of opinion that the ruling was erroneous, but that the jury could not have given any effect whatever to the mere expression of opinion, or supposition of the witness, because the whole transaction between De Lacy and the witness was afterwards given.

It was, but the narration also was received under an objection and was excepted to.

It certainly did not cure the difficulty. The question to be settled was whether the money was part of the fruits of a corrupt agreement, whether the transaction was an incident of the scheme with the formation of which the defendant was charged, whether the alleged fact of bribery was true, and this, like any other question of fact was to be settled by evidence.

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witness was not evidence. The jury might, however, naturally reason that the conclusion of the witness drawn from all the facts within his own knowledge, fairly represented the nature and the extent of the connection between the circumstance to which he testified and the fraudulent practices which had preceded it. It was admitted because claimed to be relevant and material by the prosecuting officer and the court, and whether in any, or in what degree it did affect the jury, cannot be known. The payment of a large sum of money to the witness was a palpable fact. Whether it was paid to him in his capacity of alderman, or in connection with or on account of the consent obtained from the board of aldermen, could not properly be answered by the jury upon the suspicion or conjecture of the witness. That it was not so answered we cannot say. The respondent's counsel, however (the district-attorney), argues that the question was proper, but that the answer was not responsive. The interlocution between the witness and the prosecutor seems to indicate that there was no misapprehension on the part of the witness, and that the answer was the answer called for by the question and directly fitting to it. The learned counsel did not stop his examination after proving the receipt of the money, but sought the mental conclusion of the witness as to the consideration of or inducement to the gift, and the answer was accepted by him.

Fourth. The public prosecutor, to make out the case and as part of his evidence in chief, offered to show by a detective officer that he had been employed by the district attorney to serve subpoenas upon Maloney, Keenan and De Lacy, all of whom the district attorney claimed to be material and competent witnesses, and to show further that the detective was unable to find them in this state, but did find Maloney in Canada, and there served him with a subpoena and learned that the others were in Canada also, although he did not see them. These persons were named in the indictment as co-defendants with Sharp, and the evidence already in, tended to show that some of them, and especially Maloney, were intermediaries between the persons offending against the provisions

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of the statutes relating to bribery, or instruments of whomever committed the act charged.

The evidence was objected to by defendant's counsel, but admitted. It was not claimed by the prosecution that the defendant was privy to their absence, or that the object of the proof was to furnish a basis for evidence otherwise inadmissible. The learned district attorney disclaimed any intention "of proving the flight of these persons as co-conspirators" and so make use of their absence as evidence of guilt, or an admission by their conduct that the accusation against them and the defendant was true, but said he offered it only for the purpose of showing that after diligent effort he was unable to procure their attendance as witnesses, and thus enable him to account for their absence.

His claim is that they were depositaries of the direct proof of the conspiracy which the prosecution were engaged in establishing, and accomplices of the defendant. The evidence already in was, so far as Sharp was concerned, altogether circumstantial, but tender to show that the persons named, or some of them, were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue. We think evidence of their absence was inadmissible. It could have no legitimate bearing upon the issue, and the danger is very great that such testimony will prejudice a party against whom it is offered. It may be, and frequently is admissible in answer to evidence from the other side which would naturally call for an explanation. But the absence out of the jurisdiction of the court of an associate, or one seemingly connected with the defendant in the act charged, is easily construed as evidence of guilt, and unless the occasion calls for such proof it should not be allowed. It is an old maxim that "he confesses the fault who avoids the trial," but in its application, even to the fugitive, there is great danger of error. A man may avoid the trial from many motives besides consciousness of guilt, but however actuated his conduct can in no degree, in a court of justice, reflect upon another. Its admission in this case was virtually saying to the jury, "there

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is better evidence, and it might be had from the defendant's associates; it is not the fault of the prosecution that the evidence is not before you, but because of the voluntary act of those who, with the defendant, stand charged with the offense." Thus the non-production of the witnesses is made to supply the place of proof of the issue; with that issue the evidence had no possible connection. The rule is that where a party to an issue on trial has proof in his power, which, if produced, would render material, but doubtful, facts certain, the law presumes against him if he omits to produce that proof and authorizes a jury to resolve all doubts adversely to his defense. But the rule cannot be applied unless it appears that the proof, whether it is a living witness or paper, is within his power. It is easy to see that the evidence offered here might be used for an ulterior purpose, although not pressed by the prosecution, yet entertained and made effective by the jury, and there certainly could be no presumption that the prosecution had the power to produce any particular witness, certainly not one of those named, nor did the law require it of them. It is, therefore, impossible to find any reason for, or lawful purpose to be gained by the proof offered, and its admission was a very dangerous innovation upon the general rule, which excludes it as irrelevant to the issue. Nor was it a mere question as to the order of proof. It was introduced as affirmative evidence, and while it could do the prosecution no legal good, must subject the defendant to the prejudices and unfavorable inferences suggested by the absence of a co-defendant whose presence, if innocent, could not but assist the defendant, but whose absence and refusal to obey a subpoena might easily be regarded as a confession of guilt, and could not fail to strengthen in an appreciable degree the case of the prosecution. The only case cited in support of the ruling is *Pease v. Smith* (61 N. Y. 477). That was a civil action. The absent witness was confined in a State prison, not by his own consent, and whatever may be said of the decision, it has no application here nor should it be extended to other circumstances than those there disclosed.

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It is also said by the district attorney that the defendant upon cross-examination of one of the prosecutor's witnesses, had shown the absence of one of these persons and that he was in Canada. The same fact as to all of them seems to have been assumed as if already before the jury. Why then was the evidence insisted upon? In answer to a question from the learned trial judge whether the defendant would not "have a right to argue to the jury in summing up, that, in view of all the testimony, the People should have called Maloney," the defendant's counsel said, "no sir; how could we argue that, when we know already from the opening of the district attorney that Maloney is not accessible to a subpoena," and disclaimed any intention of so doing, or that it "could be done in common fairness," with such earnestness that it is very difficult to see why the introduction of the evidence was pressed, if no other purpose existed than to escape the imputation of keeping back testimony. Proof even of the absence of these persons was inadmissible. But that was not all. The proof was not only of their absence, but of unavailing search by a detective, the service of a subpoena upon some of them and the failure to obey its mandate. Under the circumstances of the case the ruling of the court in this instance may not have been of much importance, and upon it alone we should not grant a new trial. But the legal principle which requires relevant and material evidence, and admits no other, is important, and however serious the charge against an accused person may be, and however great the evil it uncovers, he cannot properly be made the subject of a judicial sentence unless the crime is substantiated according to the established rules of evidence. The other exceptions above referred to point to violations of those rules to the manifest prejudice of the defendant, and to the benefit of those exceptions he is entitled. They require a new trial, and that it may be had the judgment of the court below and the conviction should be reversed, and a new trial granted.

PECKHAM, J. It seems to me that the admission of the evidence given by the witness Pottle was error. There is not

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room for much discussion in regard to the general principle upon which evidence that proves or tends to prove the prisoner guilty of other felonies or misdemeanors is admitted. It is conceded on all sides that the admission of such testimony forms an exception, and a very material and important exception, to the general rule of evidence. The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose where that is important of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor. Whether the evidence in any particular case comes within the well-known exceptions to the general rule, is often the difficult question to solve, and not as to what the rule itself really is. Thus, there is a class of cases in which evidence is admitted where it is material to show guilty knowledge of the character of the act committed by the prisoner. A good illustration of this class of cases is in the trial of an indictment for passing counterfeit money. Evidence of the passage of like money within a reasonable time before or after the commission of the offense for which the prisoner is on trial, is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. A man might think the money he passed was good, and he might be mistaken once, or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit. Hence, evidence of such repetition bears directly and materially upon the issue before the jury. To this same class would belong the case of an indictment for shooting an individual. For the purpose of proving that the shooting was not accidental, where such a fact is claimed,

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evidence may given of efforts, or even threats, made by the defendant to shoot the same individual on prior occasions. Thus the probability of the shooting being accidental is lessened by showing prior efforts or threats to accomplish the same act for which the prisoner is on trial. Cases of embezzlement and of obtaining money or other property by false pretenses come under the same general rule. A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility perhaps, that the entry was a mistake, but the probability of such mistake would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person.

Then there is another class of cases in which the facts show the commission of two crimes, and that the individual who committed the other crime also committed the one for which the defendant is on trial. Evidence is then permitted to show that the defendant was the person who committed the other crime, because in so doing under the circumstances and from the connection of the defendant with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial. Another class in which evidence of this nature is admissible is where it is proper for the purpose of showing a motive for the commission of the main crime.

It is claimed in this case that the evidence was admissible on the ground that it showed or tended to show the intent on the part of the prisoner in paying the money to Fullgraff after proof had been received that money was given him, and also upon the ground that it tended to show the motive of the defendant for the commission of the crime. If this evidence did materially and directly tend to show either such intent or motive, and if it were not too remote in point of time, and if it logically connected the fact to be proved with the main transaction, then it may well be that it was admissible, even though it tended to prove the defendant guilty of another and separate offense. The admission of the evidence of Pottle seems to me, however, to carry the principle further and to a

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much more dangerous extent than any other case that has come under my observation.

Upon the question of the intent with which the money was paid to Fullgraff, the evidence I think falls far short of such logical and close connection therewith, as is necessary to render it admissible. The fact being established that such payment was made, and that the defendant was connected with its payment, the intent could not be a matter of any real doubt. That it was paid to obtain the vote of Fullgraff as an alderman for granting the franchise to the Broadway surface railroad could not be made a subject of honest discussion. All the evidence was to that effect, and there was absolutely no evidence to the contrary, and to offer evidence of the commission of another crime for the avowed purpose of thereby showing the intent with which this money was paid to Fullgraff would have made to my mind a clear case of offering it on a colorable issue, and using it for another and wholly inadmissible purpose. However that may be the evidence was not admissible even on the question of intent.

As is very well said by Mr. Justice AGNEW in *The State v. Lapage* (57 N. H. 245-295), "it should also be remarked that this being a matter of judgment it is quite likely that courts would not all agree, and that some courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the courts have always professed to put the admissibility of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other."

Judge EARL, in the case of the *People v. Shulman*, reported in a note to *Mayer v. People* (80 N. Y. 364, at 376), states as follows: "But there is one general rule which must apply to all such cases. There must be in the transaction thus sought to be proved some relation to or connection with the main transaction. That is they must show a common motive or intent running through all the transactions or they must be such as in their nature to show guilty knowledge at the time

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of the main transaction." And in the case of *Mayer v. People* (*supra*), which was the case of an indictment for obtaining goods by false pretenses, RAPALLO, J., in speaking of the admissibility of testimony of this nature upon the question of intent, said: "That when the representations, their falsity and the knowledge of the accused that they were false is established by competent testimony, the allegation that they were made with intent to defraud may be supported by proof of dealings by the accused with parties other than the complainant, which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general transaction."

Under such conditions and guided by such rules, it does not seem to me that this evidence by Pottle was so connected legitimately with the main transaction, that of the alleged bribery of Fullgraff, as in any way to characterize the intent with which the money was alleged to have been paid Fullgraff, in any other sense than the evidence tends to show capacity upon the part of the defendant to commit the crime because he had months before attempted to commit one of a similar nature with another person for the purpose of accomplishing another act.

It is a very general and extremely broad, and I think a dangerous ground, upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was so desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the defendant was capable of committing the crime alleged in the indictment, because he had been willing to commit a similar crime long before, at another place and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground for the purpose of letting in evidence of the commission of

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another crime is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tend to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question, and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person, at a different place and to accomplish the commission of another act. It throws light upon that intent only, as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice instead of by evidence showing the actual commission of the crime for which the defendant is on trial.

Upon the question of motive, using that word in the sense of a reason why the prisoner should commit the crime, I do not see that it has the least materiality or bearing. It shows and tends to show no such reason. It only tends to show that the prisoner took an interest in the inclusion of Broadway in the bill permitting railroad tracks to be laid in the streets of cities. It might be argued, therefore, that he took an interest in or had a desire for a railroad in that street. As a reason or motive for such desire the evidence in no aspect tends to enlighten us. By the passage of the act of 1883, the prisoner would have had no greater right than any one else to obtain the road. Others could compete for it as well as a corporation in which he was interested. No reason for any interest in this question is shown by this evidence. It is the simple, bald and naked proposition which the evidence is claimed to prove, viz., the interest of the prisoner, and this interest is to be established by proof of the commission of a crime under the circumstances detailed, and months before the commission of the one charged in the indictment. This cannot be said to prove or tend to prove a motive for the

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commission of the crime in question within the meaning of the law, while upon the question of mere interest or desire the evidence is too remote and too dangerous to be permitted.

One of the cases cited upon this branch of the argument was that of *Pierson v. People* (79 N. Y. 424). There the prisoner was charged with murdering one Withey who was a married man. The prisoner was also a married man. Evidence had been given of intimate relations, though not necessarily criminal, between the prisoner and Withy's wife, before the death of the deceased. After the murder the prisoner took the widow and her sister to the house of a friend in the evening and came away with the widow late that night alone. A few days after the murder the prisoner disappeared from the neighborhood. It was then proved by a witness from Michigan, who was a clergyman, that the prisoner and the widow of Withey appeared before him and were married, and that the prisoner declared on oath before him that he knew of no legal obstacle to his marriage with the woman and thereupon he married them. This evidence was objected to on the ground that it had no direct or material bearing upon the main question in the case, and that it simply tended to prejudice the prisoner by proving him guilty of another and separate felony. The evidence as to the murder was circumstantial, and this court held that the evidence in controversy was proper for the purpose of proving a motive for the murder. In that case the evidence showed a direct and logical connection between the murder of the deceased and its perpetration by the prisoner. It showed that the prisoner had a passion for the possession of the wife of the deceased, and that for the purpose of obtaining possession of her person he did commit the crimes of perjury and bigamy, and to accomplish this possession of the woman, the taking off of the woman's husband was an obvious necessity. The motive of the prisoner was the desire for the woman, and the strength of that desire, in other words the strength of the motive which impelled the murder was shown in this way.

The case of the *People v. Wood* (3 Parker's Cr. Rep. 681)

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was also cited. That was a Special Term case, which arose upon an application to the learned justice who delivered the opinion, for a stay of proceedings upon the conviction of the defendant for murder. Evidence had been given of separate and distinct felonies committed by the prisoner for the purpose of showing motive on his part in the killing of the deceased. The learned court held that the evidence was admissible because it tended to show with other evidence that the felonies were parts of a single transaction, influenced by a single motive and design to accomplish a single object; that they were all connected by unity of plot and design, and if proved would tend to show the motive which actuated the prisoner in taking the life of the person stated in the indictment. In that case the evidence tended to show that each felonious act was a necessary one for the purpose of carrying out the main object which then existed in the mind of the prisoner, and that all of them formed but one transaction and were connected together as parts of one whole.

Now the evidence in the case at bar was of no such character. At the time of its alleged occurrence no law had been passed. It did not appear and could not appear that at that time any law ever would be passed. It was an act remote in point of time, different in purpose and of an entirely separate and distinct matter, forming no part of one main transaction and to my mind coming nowhere near the standard for the admissibility of such evidence, pronounced by all the cases which I have been able to find.

The case of the *Stout v. People* (4 Parker's Cr. Rep. 132) contains the same general principles. There, evidence was admitted to the effect that the prisoner was seen in bed with the wife of the man he was charged with murdering, although such wife was also the prisoner's sister, and it was admitted as furnishing a motive for the prisoner to get the husband out of the way. I have looked at the other cases referred to by the learned counsel for the prosecution, and find that they come under the designation of one or the other of the classes already referred to. *Commonwealth v. Tuckerman* (10 Gray, 173,

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199) was a case of embezzlement and evidence of other embezzlements from the same party during a series of years and contained in a statement made by the prisoner was admitted.

Commonwealth v. McCarthy (119 Mass. 354), was an indictment for arson. To prove the intent of the prisoner evidence was received that on two prior occasions the prisoner had set fire to a shed ten feet distant from the building destroyed and connected therewith by a flight of stairs. This had a direct tendency to prove that the firing was not accidental but intentional and felonious.

Commonwealth v. Bradford (126 Mass. 42), was an indictment for arson, and the same class of evidence was received and for the same purpose.

Commonwealth v. Merriam (14 Pick, 518), was an indictment for adultery. Evidence of improper familiarity between the defendant and the same woman, shortly before the act in question was admitted. The evidence was admitted on the ground that intimacy and these acts of familiarity with the same woman had a tendency to establish the fact of the adultery charged in the indictment. Evidence tending to show previous acts of indecent familiarity would have a tendency to prove, in the case of the same woman, of course, a breaking down of all the safeguards of self respect and modesty and hence a gradual preparation of the woman to lend herself to the commission of the crime.

The case of *People v. O'Sullivan* (104 N. Y. 481), forms no precedent for the admission of the evidence in this case. We simply held that upon the trial of the defendant for the crime of rape it was competent to prove that he had attempted to commit the same crime upon the same woman a short time prior thereto. It was put upon the ground that upon the trial of a person for a particular crime it is always competent to show upon the question of his guilt that he had made an attempt at some prior time, not too remote, to commit the same offense. It was said further that it would be incompetent to prove that the defendant had committed or attempted to commit a rape upon any other woman. And it

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was stated that upon the trial of a prisoner for murder it is competent to show that he had made previous attempts or threats to kill his victim, and hence upon the same principle it was held that when charged with rape it was competent to show that the defendant had previously declared his intention to commit the offense or made an unsuccessful attempt to do so.

In the case of *Commonwealth v. Abbott* (130 Mass. 472) upon an indictment for murder, proof was offered on the part of the prisoner of former ill feeling of the husband of the deceased toward the deceased. It was rejected as too remote and disconnected with the crime charged. Particularly as there was evidence of the parties living together on good terms long subsequent to the time of this alleged ill feeling. This is certainly no precedent for the admission of the evidence in question in the case at bar.

In *Commonwealth v. Jackson* (132 Mass. 16) the prisoner was indicted for selling property by false representations under the Massachusetts statute. Evidence of sales of other property of a like nature to other persons under representations proved false was admitted for the purpose of showing the intent with which the representations in question were made. The Supreme Court of Massachusetts held that the evidence was inadmissible, and that for the error of its admission a new trial should be granted. The case is cited only for the purpose of quoting the opinion of the court upon the danger of this kind of evidence.

DEVENS, J., writing the opinion, said that, "the other statements made by the defendant at other times as to the other animals which he sold, might have been false, while those made in the case for which he was tried were not. The transactions formed no part of a single scheme or plan any more than the various robberies of a thief. They were entered upon as from time to time he might succeed in entrapping credulous or unwary persons. Even if they were transactions of the same general character, they differed in all their details, and the defendant was compelled to defend himself against three distinct charges in addition to the one for which alone

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he was indicted. Evidence of the commission of other crimes by a defendant may deeply prejudice him with the jury, while it does not legally bear upon his case. It certainly would not be competent in order to show the intent with which one entered a house or took an article of personal property to prove that he had committed a burglary or larceny at another time." He further said in the same case, "the objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues and thus diverts the attention of the jury from the one immediately before it, and by showing the defendant to have been a knave on other occasions creates a prejudice which may cause injustice to be done him." I think the remarks are very pertinent in this case. The reasoning herein leads to the exclusion of evidence as to past offenses such as Pottle's evidence tends to prove, whether it is directed towards proving the bribery of clerks to committees or members of the legislature of 1883 or 1884.

Upon the same basis it is difficult to see the materiality or admissibility of the evidence that the prisoner, after the passage of the act of 1884, paid to Phelps the \$50,000, as testified to by Phelps. The evidence, it can be seen, had a tendency to greatly prejudice the prisoner upon the issue of his guilt of bribing Fullgraff, while wholly inadmissible for any such purpose, and it would seem to be quite questionable to admit it for the purpose of proving an interest in a Broadway railroad, about which there could be and was no dispute or contradiction. We call attention to the question without absolutely deciding it.

We are quite clear that errors have been committed by the admission of evidence in this case, at war with the well-settled law on the subject. That law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the

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purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law all are innocent until convicted in accordance with the forms of law and by a close adherence to its rules.

For the reasons above given, as well as upon all the grounds so well stated in the learned opinion of my brother DANFORTH, I am in favor of reversing this conviction and granting a new trial.

All concur.

Judgment reversed.

THE PEOPLE ex rel. EDWIN A. NASH, Surrogate, Respondent,
v. JAMES FAULKNER, Jr. Executor, etc., et al., Appellants.

107	477
115	17
115	18
107	477
151	140

A surrogate who, as such, receives the money of private individuals, is not absolutely responsible therefor; he is only responsible for good faith and reasonable diligence.

Where, therefore, pursuant to an order of the court, surplus money, arising on foreclosure sale of land belonging to an intestate's estate, was paid over to a surrogate, and was by him deposited in good faith with a private banker in good standing and credit, doing a general banking business, pending proceedings to determine the parties entitled thereto, and before the termination of such proceedings the banker failed and his estate proved to be largely insolvent. *Held*, it appearing there was no negligence on the part of the surrogate, that the sureties on his official bond were not liable for the loss.

Muzzy v. Shattuck (1 Den. 233) distinguished.

People ex rel. Nash v. Faulkner (38 Hun, 607) reversed.

(Argued October 8, 1887; decided December 6, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 38 Hun, 607.)

This action was brought upon the official bond of a county judge and surrogate.

Samuel D. Faulkner was county judge and surrogate of Livingston county, from the 1st day of January, 1872, until the 9th day of August, 1878, when he died intestate. The

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defendants, James Faulkner and Henry J. Faulkner, were sureties upon his official bond which was conditioned that Samuel D. Faulkner should "well and truly, and faithfully in all things, perform his duties as county judge of Livingston county, and shall well and truly and faithfully perform his duties as surrogate of said county of Livingston, and shall well and faithfully apply and pay over all moneys and effects that may come into his hands as such county judge in the execution of his office, and shall well and faithfully apply and pay over all moneys and effects that may come into his hands as such surrogate in the execution of his office without fraud, deceit or delay." While he was surrogate of Livingston county a mortgage executed by Samuel Finley, deceased, was foreclosed, and upon the foreclosure sale there was a surplus of \$1,657.46, which was paid to the county treasurer. Afterward in June, 1876, upon the application of the administrators of Finley, an order was made pursuant to the statute directing the treasurer to pay over the money to Faulkner as surrogate, and the money was accordingly so paid to him. At that time James J. Cone was a banker in good standing and credit doing a general banking business at Geneseo, Livingston county, and on the 2d day of June, 1876, Faulkner deposited in Cone's bank the sum \$1,212.90 of the money so received from the treasurer, and he took from Cone a certificate of deposit for that sum, payable to his order as surrogate on demand, with interest at five per cent. Immediately prior to the making of that deposit, one of the administrators of Finley informed Faulkner that the personal property of Finley was insufficient for the payment of his debts, and in July, 1876, such administrators filed with the surrogate a petition pursuant to the statute praying for authority to mortgage, lease or sell the remaining real estate left by Finley for the payment of his debts; and thereupon proceedings under the statute were taken and many claims against the estate of Finley were proved and established by different creditors. In December, 1877, Faulkner became sick and unable to perform the duties of surrogate, and he thereupon gave notice to the district

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attorney of the county, under chapter 54 of the Laws of 1874, of the fact of such sickness and requested him to act as surrogate, and he did so act. On the 29th day of January, 1877, in the proceedings to mortgage, lease or sell the real estate of Finley, he made an order to sell the same for the payment of debts. The sale was duly made and confirmed and on the 9th day of April, 1877, the administrators deposited the proceeds of the sale, to wit, the sum of \$1,591.50 in Cone's Bank to the credit of the acting surrogate, and took from him a certificate of deposit on demand with interest at five per cent, and delivered the certificate to the acting surrogate. On the 16th day of April, 1877, the acting surrogate, upon the application of the administrators, made an order that the money received as above stated by the surrogate and by the acting surrogate be distributed among the persons entitled thereto, and caused a notice of such distribution to be published as required by law. Afterward Faulkner recovered from his sickness and resumed the duties of the office of surrogate, and the acting surrogate indorsed and delivered to him as surrogate the last mentioned certificate. On the 1st day of November, 1877, while the proceedings to establish the claims of creditors of Finley were still pending, and while the money represented by the two certificates still remained on deposit Cone, who up to that time had remained a banker in good standing and credit, failed and made an assignment of all his property for the benefit of his creditors, and his estate proved to be largely insolvent. Faulkner died before the settlement of the accounts of the assignee of Cone, and on the 9th day of September, 1878, administration upon his estate was granted to James and Henry J. Faulkner. The two deposits of money were made in Cone's Bank without fraud and in good faith, and without negligence on the part of Faulkner, and with the intention of benefiting the creditors of the estate of Finley. The delay in the distribution of the money among Finley's creditors did not arise from any fault or neglect on the part of the surrogate or the acting surrogate during his illness, but was occasioned by litigation arising over

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proofs of claims. Edwin A. Nash, the relator, was duly elected county judge and surrogate of Livingston county in November, 1878, and has since continued to be and now is surrogate of that county. Thereafter the administrators of Faulkner turned over to the relator the certificates of deposit, under an agreement that the relator should collect from the assignee of Cone the dividends applicable to the payment thereof and distribute the moneys among the creditors of Finley, such action to be without prejudice to the rights of the relator of any creditors of the estate of Finley, or of any cause of action which either of them might have against the estate of Faulkner to recover the balance of the moneys, and without prejudice to any defense which the administrators might have. Thereafter the relator collected and received from the assignees of Cone the dividends applicable to the payment of the certificates, to wit, upon the first certificate the sum of \$349.23, and upon the second certificate the sum of \$440.30, which were all the moneys in the hands of the assignee applicable to the payment of the certificates. In December, 1879, the relator demanded of the defendants the amount remaining due upon the two certificates of deposit and they refused to pay the same. Afterward, at a Special Term of the Supreme Court, upon the *ex parte* application of the relator, an order was made authorizing him to prosecute the defendants in the name of the People of the state of New York as sureties upon the official bond of Samuel D. Faulkner, stating that the same was brought on his relation as surrogate of Livingston county, and this action was brought pursuant to the leave granted by that order. Upon the trial at Special Term the foregoing facts were established and found by the trial judge, and he ordered judgment against the defendants for the balance unpaid upon the certificates of deposit, amounting to \$2,616.14. Subsequently to the entry of the judgment, and pending the appeal to the General Term, James Faulkner, one of the original defendants, died, and James Faulkner, Jr., his executor, was substituted as a defendant in his place.

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Charles J. Bissell for appellants. There was, at the time of the commencement of this action, no statute in existence authorizing the Supreme Court to permit the relator to bring this action in the name of the People, and the order authorizing the bringing thereof was a nullity. (Code, § 3347, subd. 11.) At common law a public officer was liable only as bailee, for negligence or malfeasance. (*Browning v. Hanford*, 5 Hill, 588; *Moore v. Westervelt*, 21 N. Y. 103; Story on Bail, § 620 and notes; *Lane v. Cotton*, 1 Lord Raym. 646; *Whitfield v. Le Despencer*, Cowp. 754.) In determining the liability of a public officer, the court will examine the statutes prescribing the duties of the officer and will treat the bond, not as a special contract enlarging the responsibility imposed by the statute, but as a guaranty of the performance by the officer of the duties imposed by the common law and the statute. (*United States v. Thomas*, 15 Wall. 337.) In the absence of the bond the liability of the surrogate was that of a bailee; upon the bond it is no greater, because the language of the bond cannot be construed as imposing a more stringent liability upon the sureties than the statute imposes upon the surrogate. (*Supervisors Albany Co. v. Dorr*, 25 Wend. 440; 7 Hill, 583; *Muzzy v. Shattuck*, 1 Denio, 233; *Looney v. Hughes*, 26 N. Y. 514, 516; *Fake v. Whipple*, 39 Barb. 339; 39 N. Y. 394; *U. S. v. Boyden*, 13 Wall. 17, 25; *Peck v. James*, 3 Head. [Tenn.] 75; *Ross v. Hatch*, 5 Clarke [Iowa], 149; *Cumb. Co. v. Powell*, 69 Me. 357; *York Co. v. Watson*, 15 So. Car. 1; *Walker v. British Guard. Ass'n*, 89 Eng. C. L. 276; *U. S. v. Thomas*, 15 Wall. 337; *U. S. R. S.* [2d ed.], § 1062.) The surrogate is a trustee of the funds of private individuals coming into his hands, and is liable as a trustee and no further. All classes of trustees of the funds of individuals are liable only for negligence or malfeasance. (*Knight v. Lord Raymond*, 3 Atk. 480; *Ex parte Belcher*, Amb. 219; *Wicks v. Groom*, 3 Drury, 584; *Johnson v. Norton*, 11 Hare, 160; 2 Wms. on Ex'rs [5th Am. ed.], 1647; *Churchill v. Hobson*, 1 P. Wms. 243; *Rowth v. Howell*, 3 Ves. 565; *Adams v. Claxton*, 6 id. 226; *Fridge*

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v. *Dunn*, 57 Mo. 264; *Fitzsimmons v. Fitzsimmons*, 1 S. C. 400; *Lewin on Trusts*, 299; *Cornwell v. Deck*, 8 Hun, 122.) The two transactions represented by the two certificates of deposit, were deposits and not loans. The money could not be collected without a demand. (*Munger v. Albany City Nat. Bk.*, 85 N. Y. 580; *Hill on Trustees*, 378, marg. paging, note 1; *Payne v. Gardiner*, 29 N. Y. 146; *Upton v. N. Y. & E. Bank*, 13 Hun, 269.)

James Wood for respondent. The defendants waived the objection raised at the trial, that the action could not be maintained in the name of the plaintiff; and the decision of Judge DWIGHT on the first trial, that the complaint does not state a cause of action, is untenable. (*Pheonix Bank v. Donnell*, 40 N. Y. 410; *Fulton F. Ins. Co. v. Baldwin*, 37 id. 648; *Town of Pierrepont v. Lovelass*, 4 Hun, 696; *People ex rel. Lord v. Crooks*, 53 N. Y. 648.) The action is properly brought in the name of the plaintiff. (31 Hun, 317.) The creditors of Finley's estate cannot maintain an action against these defendants to recover money for which this action is brought. (2 R. S. 106; marg. §§ 36, 38, 40, 42, 43.) In respect to moneys arising from the sale of real estate in the hands of a surrogate at the expiration of his office, the successor in office, who is to order and make distribution, is entitled to the fund in the character of a trustee for the creditors and persons entitled, to distribute or invest in his name of office, as the case may be. (*Supervisor Galway v. Stinson*, 4 Hill 137; *Overseer, etc., Pittstown v. Overseer, etc., Plattsburgh*, 18 J. R. 418.) The provisions of the Code of Civil Procedure are not at all applicable to this case. This is not an action by a private person on an official bond, but an action by a public officer to enable him to discharge a public trust, and to protect the rights of those whose interests are confided by law to his care and protection, and one which the relator had, if not a positive, yet an implied authority to bring as an incident of his office, and which the proper and faithful discharge of the duties of his office required him to bring. (*Supervisor*

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Galway v. Stinson, 4 Hill, 137; *Overseer, etc., Pittston v. Overseer, etc., Plattsburgh*, 18 J. R. 418.) The defendants are liable on Surrogate Faulkner's bond, notwithstanding the failure of Cone, in whose banking office the money was deposited. (*U. S. v. Prescott*, 3 How. U. S. 378; *U. S. v. Morgan*, 11 id. 154; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Keiler*, 9 id. 83; *U. S. v. Boyden*, 13 id. 17; *Muzzy v. Shattuck*, 1 Denio, 233; *Bevans v. U. S.*, 13 Wall. 56; *U. S. v. Thomas*, 15 id. 337; *Comm. v. Cowley*, 3 Penn. 272; *State of Ohio v. Harper*, 6 Ohio St. 607; *People v. Powell*, 67 Mo. 395. [29 Am. R. 512]; *Halbert v. Indiana*, 22 Ind. 122; *Inhab. Hancock v. Hazzard*, 12 Cush. 112; *Ward v. School District*, 10 Neb. 293 [15 Am. R. 477]; *Comrs. Jeff. Co. v. Luneberger*, 3 Montana, 231 [35 Am. R. 462]; *Lowrey v. Polk Co.*, 51 Iowa, 50 [33 Am. R. 114]; 29 Alb. L. J. 404, 405, 406, 407, 408.)

EARL, J. The finding that James J. Cone was a banker in good standing and credit, and that Samuel D. Faulkner, surrogate, deposited the two sums of money in his bank in good faith and without negligence, required a dismissal of the complaint and a judgment in favor of the defendants.

At common law a public officer is bound to exercise good faith and reasonable skill and diligence in the discharge of his official duties, and he is not responsible for any loss of money which came to his official custody occurring without fault on his part. But there are various decisions of the federal courts and of some state courts imposing upon public officers charged with the duty of receiving, keeping and disbursing public money responsibility for its loss although accruing without fault or negligence. (*U. S. v. Prescott*, 3 How. [U. S.] 578; *U. S. v. Morgan*, 11 id. 154; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Keiler*, 9 id. 83; *Boyden v. U. S.*, 13 id. 17; *Bevans v. U. S.*, 13 id. 56; *U. S. v. Thomas*, 15 id. 337; *Commonwealth v. Cowley*, 3 Penn. 272; *State v. Harper*, 6 Ohio St. 607; *People v. Powell*, 67 Mo. 395; *Halbert v. State*, 22 Ind. 122; *Inhabitants of Hancock v. Hazzard*, 12

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Cush. 112; *Ward v. School District*, 10 Neb. 293; *Lowery v. Polk County*, 51 Ia. 50.) In these cases it was held that various public officers appointed or elected to receive, disburse and keep public moneys were absolutely responsible for them as debtors although they were stolen or lost or taken away from them by irresistible force and without their fault. In some of the cases, the liability of the officers was based upon statutes defining their duties and responsibilities, and in other cases upon the terms of their official bonds; and the construction of the statutes and of the bonds was much influenced by views entertained by judges as to the public policy to be enforced in such cases. In the case of the *United States v. Prescott*, Mr Justice McLEAN said that "every depositary of public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to fraud which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss, without laches on his part. Let such a principal be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public?"

At the time when that decision was made, in January, 1845, when there were no telegraph lines and but few railroads in the country, public policy may have required from public officers the rigid responsibility thereby imposed. Most of the custodians and receivers of the public moneys lived at distant points from the central government, where it was difficult to supervise their acts or control their conduct, or check and uncover their frauds. Yet that rigid rule of responsibility was greatly relaxed by acts of congress, relieving public officers who, without their fault, had lost public moneys entrusted to them; and finally by the congressional act of May 9, 1866 (14 U. S. Stat. at Large, 44), a general act was

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passed conferring upon the Court of Claims jurisdiction to hear and determine the claims of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of government funds. And it was provided that whenever the court should ascertain the fact of any such loss, and that it occurred without the fault or negligence of the officer, it should make a decree setting forth the amount thereof, and the officer should be allowed the same as a credit on settlement of his accounts. Thus as to all the officers named in that act the policy previously declared, and which largely induced the earlier decisions of the courts was changed; and in *United States v. Thomas* (*supra*) it was held that a collector or receiver of public money, under a bond to keep it safely and pay it when required, was excused from rendering the same when prevented by the act of God or the public enemy, without any neglect or fault on his part, and that it was a sufficient discharge of his bondsmen from their obligations in reference to such money that the same was forcibly seized by the rebel authorities against the will of the collector, and without his fault or negligence.

Now, in the changed condition of our country, with newspapers, telegraphs and railroads everywhere, in view of this latter decision and the federal statute referred to, it can scarcely be said that, as to federal officers, public policy now requires the enforcement of the rigid rule of responsibility imposed by the earlier decisions. But whatever the rule may now be in the federal courts, and in many of the other states, it is not the settled law of this state that public officers who have given bonds for the faithful discharge of their official duties, become debtors for the public moneys which come into their hands in their official capacity, and are absolutely liable for such moneys although lost without their fault or negligence. In *Supervisors of Albany County v. Dorr* (25 Wend. 440), the action was upon the bond of a county treasurer, conditioned that he would faithfully execute the duties of his office and pay over according to law

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all moneys which should come to his hands as such treasurer, and render a just and true account thereof to the board of supervisors of his county. The defense was that the money claimed was feloniously stolen from his office without any negligence or fault on his part; and it was unanimously held by the court that the facts stated constituted a defense. And the general rule was laid down that a public officer intrusted with the receipt and disbursement of public funds is not responsible for moneys stolen from his office without negligence or fault on his part, and is liable only for moneys lost through his misfeasance or neglect. The opinion in that case was written by Chief Justice NELSON and concurred in by Justices BRONSON and COWEN. The case was carried to the Court of Errors where the judgment was affirmed by an equally divided court. (7 Hill, 583.) The doctrine of that case has been erroneously supposed to have been overruled by the decision in *Muzzy v. Shattuck* (1 Denio, 233). In the latter case the action was upon the official bond of a town collector, and the defense was that the money was stolen from him. It was held that the defense was not good, the Supreme Court then being composed of BRONSON, Ch. J., and Justices BEARDSLEY and JEWETT; and BRONSON, who concurred in the prior decision, also concurred in this without any indication that he had changed his views. The prior decision was referred to in the opinion of the court, but not criticised or disapproved. This decision was based, not upon the common law, and not upon the force and effect of the official bond given by the collector, but upon the statutes defining the duties and liabilities of the collector; and the court held that by those statutes he was made an absolute debtor for the money collected by him, and that the fact that the money was stolen, therefore, constituted no defense. That case was afterwards carried to the Court of Errors and unanimously affirmed. The opinions of that court, however, if any were written, have not been reported. It is clear that the decision in *Muzzy v. Shattuck* was in no way in conflict with the decision in the case of the *Supervisors v. Dorr*, and did not expressly, or by

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implication, overrule that decision. The decision in *Muzzy v. Shattuck* has always been understood as being based upon the statute which made the collector an absolute debtor for the moneys which he was ordered by his warrant to collect. (*Looney v. Hughes*, 30 Barb. 605; affirmed, 26 N. Y. 514; *Fake v. Whipple*, 39 Barb. 339; affirmed, 39 N. Y. 394.) While the case of *Supervisors v. Dorr* was affirmed by an equal division of the Court of Errors, that affirmance does not add to it as an authority, and it remains simply the unanimous decision of the Supreme Court. In view of the decisions of the federal and state courts above cited, and the fact that that decision has been much questioned and has by some been supposed to have been overruled by the decision in *Muzzy v. Shattuck*, it should, probably, not be regarded as binding authority in this state, and the question therein decided may yet be regarded as an open one. When a case arises against an officer for not paying over and accounting for public moneys intrusted to him in his official capacity, it will be necessary to determine whether his liability in the absence of statutes specially defining it, shall be governed by the common law, or whether the broad and more rigid rule of responsibility laid down in the cases above referred to shall be enforced in this state. It is not necessary to decide that question in this case because the money here received by the surrogate was not public money, but the money of a private estate or of private individuals. It does not follow because public policy requires that public officers who receive public money should be held to the rigid responsibility, that the same rule should be applied to public officers who receive the money of individuals who are stimulated by private interests to some watchfulness over the conduct of the officials and to some scrutiny as to the custody of their funds.

The surrogate was not a public officer appointed to receive or disburse public money, and it was not even his main duty to receive, keep or disburse the money of individuals. His principal duties were judicial in their nature, and any duties which he had in reference to moneys which came into his hands

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were merely incidental to his judicial duties. The statute required that the surplus money arising from the foreclosure sale should be paid over to the surrogate, and he was to hold the same for distribution among the creditors of the deceased, upon proof by them of their claim as provided by the statute. (2 R. S. [6th ed.], 118.) The proceeds of the sale of the real estate made by the administrators of Finley were required to be brought into the office of the surrogate, to be retained by him for distribution among the creditors in accordance with the provisions of the statute. (3 R. S. [6th ed.], 115.) This money, therefore, came lawfully into the possession of the surrogate, and there is nothing in the statute which makes him an absolute debtor for it. He was to keep it, and when the time came for its distribution was to distribute it among the creditors of the deceased. It might remain in his custody for a long time, until the claims of the creditors had been established, and all litigation in reference to them and the money finally ended. The law did not provide the surrogate with a safe or other place of deposit, but left it to his own good sense and judgment to determine how he should keep and safely care for the money. There is nothing in the policy of the law which requires that he should be absolutely responsible for such money. If this money had been paid under an order of any court to its clerk or to a receiver or any other officer, there would not have been the absolute responsibility which is claimed by the plaintiff in this case. Such clerk or other officer would have been responsible only for good faith and reasonable diligence in the care of the money. (Story on Bailments, § 620.) Why should a greater responsibility rest upon the surrogate than upon such clerk or officer? There is no clerk or officer of the surrogate's court to whom the money can be paid, and hence the surrogate is required to receive and distribute it himself. He is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee. If he had been a trustee and had deposited this money in good faith, without

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any negligence on his part in this bank, its loss by the failure of the banker would have been a good defense. (1 Perry on Trusts [3d ed.], § 443.) Why should his responsibility be greater than that of the administrators from whom he received the money? The statutes and the official bonds of executors and administrators impose upon them as broad an obligation as is imposed upon the surrogate by the statutes and by his official bond, and yet it is conceded that if the administrators had deposited the money of their estate in this bank, in good faith, and without negligence they would not have been responsible for its loss. (2 Williams on Executors [5th Am. ed.], 164; 3 Redfield on Wills, 394.)

There is nothing in the phraseology of the bond given by the surrogate which enlarges his statutory liability. It is a bond simply for the faithful performance of his duties, and the faithful application and payment of all moneys that may come into his hands. It imposed upon the surrogate no broader responsibility or liability than the statute. It was simply designed to enforce and secure the faithful discharge of his duties, and any defense which he would have had when called to account for the money which came to his hands is available to his sureties when sued upon the bond.

We have, therefore, reached the conclusion that in this state there is no statute applicable to surrogates which imposes upon them the broad liability claimed by the plaintiff; that there is no public policy which requires that the rule of responsibility should be thus rigorous, and that there is nothing in the terms or letter of the bond which imposes the absolute liability claimed.

This deposit in Cone's Bank was not a loan to him, an unauthorized investment which would be condemned by the law. It was the same as a deposit in an incorporated banking institution. It was probably not as safe or judicious. but that circumstance only had legal bearing upon the question of good faith and proper care and diligence, and that has been found in favor of the defendants. The fact that the deposit was payable with interest makes no difference as it was still a

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deposit payable upon demand, and the requirement of interest was a provident arrangement for the benefit of the persons interested in the fund.

We are, therefore, of opinion that the facts proved and found in regard to the deposit and loss of this money established a defense available to these defendants, and without considering other questions brought to our attention and ably argued, we conclude that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

ELIZABETH BICKFORD, Respondent, v. HENRI MENIER et al., Appellants.

The rule that a principal is liable for the acts of his agent, within the apparent scope of his authority, only applies where a third person has acted, believing and having a right to believe that the agent was within his authority, and where such person would sustain loss if the act of the agent was not considered that of the principal.

To authorize an inference of authority in an agent it must be practically indispensable to the execution of the duties really delegated; it is not sufficient that the act of the agent is convenient or advantageous, or more effectual in the transaction of the business provided for.

Where defendants, doing business in France, sent an agent to New York city, with authority to receive consignments of goods from his principals, to care for and sell them, and after paying the expenses of the business from the receipts, to remit the balance to them, and where such agent carried on the business so entrusted to him in his own name. *Held*, that no authority in the agent could be implied to borrow money for his principals; and that they were not liable for moneys borrowed by him without their authority, to pay an indebtedness due from him, to them; also that no inference of authority could be drawn from the fact that the agent had been especially authorized to borrow in certain cases.

Bickford v. Menier (36 Hun, 446) reversed.

(Argued June 30, 1887; decided December 13, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below, 36 Hun, 446.)

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The nature of the action and the material facts are set forth in the opinion.

S. P. Nash for appellants. A power to borrow must be clearly shown. All the presumptions are against it. Factors and consignees entrusted with goods for sale have no right, in addition to owing their principals for proceeds, to involve them by additional obligations. (1 Chit. on Cont. [4th ed. 1874], 293; *Havotayne v. Bourne*, 7 M. & W. 595; *Ricketts v. Bennett*, 4 C. B. 686; *Rossiter v. Rossiter*, 8 Wend. 494; 1 Pars. on Cont. 42, 43, note *e*; *Tucker v. Woolsey*, 64 Barb. 142; *Bank v. Buckbee*, 1 Abb. Ct. App. Dec. 86; 3 Keyes, 461; *Bates v. First Nat. Bk.*, 89 N. Y. 286; *Tallmage v. Third Nat. Bk.*, 91 id. 531; *The Julia Blake*, 107 U. S. 418; *McCready v. Thorn*, 51 N. Y. 454.) Guenin being simply an agent, could not have conferred any powers upon Bickford to bind the defendants. His sending him out to sell goods was probably ratified, but this did not involve a power to borrow money on the credit of the principals. (2 Kent, 633; *Newton v. Bronson*, 13 N. Y. 587; *Lewis v. Ingersoll*, 3 Abb. Ct. App. Dec. 55; 1 Keyes, 347.) Guenin would have been a competent witness to prove what Bickford's authority was, but his statements and declarations were not competent, as they were not a part of the *res gestæ*. (*White v. Miller*, 71 N. Y. 118; *Alexander v. Cauldwell*, 83 id. 480, 486.) When there is no evidence of custom to interpret a vague authority conferred upon agents, and no conflict of evidence as to what the employment was, the question as to whether any particular transaction is within the scope of the agent's apparent authority is one for the court, not the jury. (*Millbank v. Deniston*, 21 N. Y. 386; *Ruis v. Renauld*, 100 id. 256.)

John B. Pannes for respondent. The right to borrow money was within the apparent scope of Mr. Bickford's authority, and the plaintiff had a right to rely upon that apparent authority. (*Hearne v. Keene*, 5 Bosw. 570; *Pentz v. Stanton*, 10 Wend. 271.) The defendants are estopped from denying the authority of the agent, Bickford, to borrow

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money for their business by their acquiescence in such borrowing for nearly seven years with knowledge of the fact. (*Wood v. Auburn R. R. Co.*, 6 N. Y. 167; *Huncken v. Knocke*, 23 W. Dig. 17.) The question, whether the authority under which Bickford acted, included the right to borrow money was a question of fact for the determination of the jury, the evidence being conflicting. (Code of Civ. Pro. § 1337; *In re Ross*, 87 N. Y. 514; *Davis v. Clark*, id. 623; *Marx v. McGlynn*, 88 id. 357; *Hewlett v. Elmer*, 103 id. 157; *In re Will of Darrow*, 95 id. 668.) The powers of a general agent are co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals, (*Ins. Co. v. Wilkinson*, 13 Wall. 222; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 207.)

RUGER, Ch. J. This action was brought by the plaintiff to recover of the defendants the sum of £1,200, alleged to have been loaned to them, by her in the following sums at the times mentioned, viz., £200 in November, 1878; £200 in March, 1879, and £800 in May, 1879. Previous to these loans the plaintiff does not appear to have had any personal or written communication with the defendants in respect thereto, but alleges that she loaned the money to one Edward Bickford, an alleged agent of the defendants.

The loans were made at the city of New York, of which place the plaintiff and Edward Bickford, who were brother and sister, were both residents, and the defendants resided at Paris, in France. It is not claimed that Edward Bickford had any written power of attorney to borrow money for the defendants, or any positive unwritten or verbal authority to do so, but it is argued that the plaintiff had the right to imply such authority, from the power which Edward Bickford appeared to exercise as the agent of the defendant. The power which such agent really possessed and the scope of his agency is left, by the case, altogether to be inferred from the course of business pursued by the agent, and the verbal agree-

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ment between the parties under which he entered into the employment of the defendants. That he was an agent for certain purposes is not disputed, but it is strenuously contended by the defendants that he had no power to borrow money.

The evidence as to the terms of the contract of employment and as to the methods of transacting the business carried on under it, is quite vague and inconclusive, and we have been unable to discover therefrom any facts from which an intention, on the part of the defendants, to vest the agent with authority to borrow money in their names, for the purposes of the business in which he was employed, can reasonably be derived. It was said by Judge COMSTOCK in *Mechanics' Bank v. New York and New Haven Railroad Company* (13 N. Y. 632), "that underlying the whole subject there is this fundamental proposition that a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it, and beyond the terms of the instrument or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power may be established." This doctrine was somewhat extended in the case of the *New York and New Haven Railroad Company v. Schuyler* (34 N. Y. 30), where it was held, "that when the authority of an agent depends upon some fact outside the terms of his power and which, from its nature, rests particularly within his knowledge, the principal is bound by the representations of the agent, although false, as to the existence of such fact."

Such extension of the rule, however, has no application to this case, as the facts proved do not bring it within the principal stated. It would seem to be the general rule that no acts of an agent can be resorted to, to establish a power, not included within the terms of his commission, except those which are brought to the knowledge of his principals and are approved or acquiesced in by them.

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It was said by Judge ANDREWS, in *Welsh v. Hartford Insurance Company* (73 N. Y. 10), that "the authority of an agent is not only that conferred upon him by his commission, but also as to third persons, that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons who, believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal." A reference to the undisputed evidence in the case, will show the nature of the agency intended to be created by the defendants, and the extent of the power which may fairly be implied therefrom. The rule that a principal is bound not only by the acts of the agent, which are expressly authorized by his commission, but also for the exercise of all powers which are necessary and essential to the execution and performance of the express purposes described in his commission, is assented to by the court below and by both parties to the action. In view of this rule let us look at the case, for the purpose of discovering the real authority conferred.

The defendants were chocolate manufacturers, carrying on their business and residing in the city of Paris, France. They also had a branch factory and agency in the city of London, under the charge and management of one Emile Guenin. In and subsequent to 1868 Edward Bickford was a clerk in their employ in London, and in 1872, for certain reasons, deeming it desirable to establish an agency for the sale of their goods in New York, they made overtures to him, to proceed there and receive consignments and make sales of their manufactures upon a salary. In relation to the original employment, Mr. Bickford testified as follows: "I came from London to New York to establish the house of Chocolate Menier for these defendants; at first I opened an office at 45 Beaver street; cleared the goods from the ship, and commenced selling their goods, and from that time forward, up to 1882, I continued in business in New York city for them; during that time I

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made my returns and received goods from the London house; * * * when I came from London to New York to open this chocolate establishment, I brought no power of attorney with me; I had several cases of goods, chocolate, and I opened in the name of Edward Bickford, and the business was carried on in that name; I sold chocolate and other manufactured goods on a salary. * * * I opened books of account and made returns from time to time; rendered accounts to Mr. Guenin, of London; * * * from that time down to 1879 I kept regular books of account, and a bank account in James G. King's Sons, also in the Bank of the Metropolis, in the Merchants and Manufacturers', the Irving, and the New York National Exchange Bank; those accounts were all kept in the name of Edward Bickford."

These extracts from Bickford's evidence embrace all of the facts proved by the plaintiff relating to the character of the original employment, and the nature of the agency intended to be conferred upon Bickford. It will be seen therefrom, that the sole authority actually conferred was the right to receive the property of the defendants, to store and sell it. An implied power may be derived, from the express powers mentioned, to apply such part of the proceeds of sale as was necessary to pay his salary, and legitimate expenses required in carrying on the business. It follows as a necessary consequence that it was his duty to remit the balance to his principals. There is certainly nothing in the performance of these duties which rendered it necessary that Bickford should borrow money on the credit of his principals. It is idle to argue that an authority to borrow money may be implied from a naked power to receive and sell property and remit proceeds. The duties of an agent in such a case are analogous to those of a factor, and it is well settled that such an agent has no authority to borrow money in the name of his principal. (1 Parsons on Contracts, 42, note e; 1 Chitty on Contracts [11 Am. ed.] 293; *Rossiter v. Rossiter*, 8 Wend. 494; *Hawtayne v Bourne*, 7 M. & W. 595.)

If we examine the evidence relating to the course of the

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business actually carried on under this employment, we shall fail to find any exercise of a power to bind his principals for borrowed money, or any similar power which would authorize the implication that he possessed such a power. No evidence appears authorizing the inference that the defendants held Bickford out to the American public as an agent of theirs for any purpose. The business was all carried on in the individual name of Edward Bickford, and it does not appear that the names of the defendants were in any way used in the business. There was evidence that Bickford was in some way introduced by the defendants to the banking firm of John G. King & Sons, but nothing was shown authorizing the inference that he was thereby empowered to borrow money generally of them in the name of his principals. It is quite significant that in a course of correspondence extending over a period of ten years between the agent and his principals, no allusion is made to the existence of any such power, and neither is there any apparent ratification by the principals of the exercise of such power on the part of the agent. From a settlement of the accounts of the parties made as of the date of May 1, 1879, it appeared that the New York agency had run behind and become indebted to the defendants, over and above the property remaining on hand at the agency in the sum of £1,613, 18s. This sum represented the accumulated deficiencies of Bickford for a long period of time, and was chargeable to him as so much cash, which he was liable to account for to the defendants on demand. In other words he had, up to that time, appropriated to his own use the moneys of the defendants and failed to liquidate his obligations to them. He was enabled to square his accounts at this time by the generosity of his principals in voluntarily writing off therefrom the sum of £1,574 18s. 3d. Bickford, then, according to his own statement, started to continue the business discharged from any pecuniary liability to the defendants. Although £400 of the sum recovered in this action had been previously borrowed by Bickford, no part of it entered into the statement of May 1, 1879, and no report of such borrowing had been made by

Bickford to his principals at that time. It is obvious if this sum had entered into that statement, as it should have done if it was then in truth a liability of the defendants, Bickford's deficit had been untruly represented to the defendants, and it ought to have been increased nearly \$2,000. It is an incontrovertible inference from the evidence, that from a time anterior to these alleged loans down to a time subsequent thereto, Bickford was largely indebted to the defendants and liable immediately to be called upon for the payment of such indebtedness. A series of ten drafts dated on different days and running from October 5, 1878, to January 19, 1879, drawn by Guenin upon Bickford for small sums aggregating about £200 appear in evidence, and were apparently drawn to recover from Bickford some part of his indebtedness to his principals. Although no other drafts appear in the case, it is fairly inferable from the evidence that such drafts were generally used, and that the mode of remitting the proceeds of the goods sold by Bickford to which defendants were entitled, was by the payment of the drafts drawn upon him by the defendants.

To infer that it was within the apparent scope of Bickford's agency to borrow money in the name of his principals to pay his own debt to them, involves a manifest absurdity. The subject of borrowing was, on one or two occasions, referred to in the correspondence between Bickford and Guenin, but a careful examination shows that it invariably referred to a borrowing by Bickford of a particular firm to discharge his obligations to defendants, and no inference can be drawn therefrom that Guenin contemplated a loan upon the credit of the Meniers. It is not claimed that the plaintiff knew of these letters or transactions under them, or was thereby induced to loan the money in question, and she apparently relied altogether upon the actual authority possessed by Bickford. It is also quite clear that the references in the letters related to specific transactions, when, if anything, a special authority alone was conferred, and afford no basis for

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an inference that any general authority was possessed by, or intended to be given to the agent to use the credit of his principals.

Bickford testified that in the course of his agency he probably borrowed and remitted to his principals from \$15,000 to \$20,000, but there is no evidence in the case showing that he borrowed this money upon the credit of the Meniers, or that he did so at all until after special authority was given therefor, or that he did it for any other purpose except to discharge his obligations to his principals. If we come to the particular transaction in question we find no evidence of any loan by the plaintiff to the Meniers, or upon their credit. No representation was made by the agent that he had authority to borrow for the Meniers, and no note or memorandum was given by him to the plaintiff at the time of the loan. The drafts through which the loans were made were drawn by the plaintiff, and made payable to Edward Bickford individually.

All proof of the transaction was confined to the oral evidence of Miss Bickford and her brother given on the trial. Their evidence does not materially vary as to the circumstances of the loan and is most concisely stated in the testimony of the plaintiff. She says: "When I came over from England in November, I loaned £200 to him for the business of Menier; I loaned the next £200 in March, the next year; my brother was going to England to see Mr. Guenin, *and he required the money for the drafts*, and I was to be left in charge of the business, and I could not be left without money to pay the drafts; *I loaned it for that purpose entirely*; the £800 was loaned when he returned from England; he returned the end of April some time, and in May it was advanced; *it was loaned for the same purposes as the other money was loaned.*"

This evidence does not show that Bickford claimed to the plaintiff to have authority to borrow money in the name of the Meniers, or that he in fact, did borrow it upon their credit, or to discharge their obligations. It is probably true, in a general sense, that he wanted it for the business of Menier, but that was a business which he was carrying on in his own name and

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had incurred an indebtedness to them in performing. It was this indebtedness that the drafts were drawn to recover, and the plaintiff seems to have been cognizant of this fact. It is difficult to see how she could have supposed, that she was lending money to the Meniers, when she was obviously supplying money to pay the obligations of her brother to them.

The plaintiff has been allowed to recover in the action, upon the theory that the borrowing, in question, was within the apparent scope of the agent's authority, and this question was left, as one of fact, to be determined by the jury. We are of the opinion that the court erred in this respect, and that there was no evidence in the case authorizing a verdict for the plaintiff. The apparent authority in this case was precisely co-extensive with the actual authority. The agent's real authority was confined to the duty of receiving consignments from the Meniers, storing and caring for them, selling them and, after paying the expenses of the business from the receipts, to remit the balance to the Meniers.

If the transaction of this business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment, but it does not afford a sufficient ground for the inference of such a power, to say that the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated in in order to justify its inference from the original employment.

We are of the opinion that the case of *Tucker v. Woolsey* (64 Barb., 142), is in point. The facts of that case are the counterpart of those existing here. There the agent was furnished with goods to sell in New York for a principal in France. He there hired a place to store and show his goods. He also received special authority on several occasions to borrow money, as perhaps Bickford did here, but it was there held that the general power to borrow money was neither within the actual authority of the agent or its apparent scope.

We think the motion to nonsuit the plaintiff at the close

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of her evidence should have been granted, and that it was error to deny it.

The judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

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ROBERT YOUNG, Respondent, v. THE NEW YORK, LAKE ERIE
AND WESTERN RAILROAD COMPANY, Appellant.

Defendant's road passes east and west through the city of B. with two tracks; the south track being used for eastward bound trains and the north for those going west; the space between the tracks is about seven feet. Plaintiff, who was perfectly familiar with the location and the use ordinarily made of the two tracks, was walking, in the daytime, very rapidly north along the center of a highway running north and south, intersecting the railroad. A freight train headed east was standing on the south track; the train was divided at the crossing, leaving a space of about twenty feet for passage on the street. Plaintiff passed through this open space, and just as he stepped upon the north track, was struck by an engine going west thereon and was injured. In an action to recover damages for the injury, it appeared that when plaintiff reached the middle of the space between the two tracks he could have seen a train approaching from the east within a half mile of the crossing. Instead of looking in that direction he looked to the west and stepped immediately in front of the engine. *Held*, that plaintiff was guilty of contributory negligence; that the moment he crossed the south track it was his duty to look to the east, from which direction he had reason to believe any train on the north track would approach the crossing, and his omission to do so was a bar to a recovery.

It appeared that a brakeman of the freight train was standing in the space between the cars, to recouple them when he should be signalled so to do. It did not appear that plaintiff knew the person was a brakeman, or supposed he was there to warn travelers, or that he owed him any duty whatever, or that plaintiff in any way relied upon the brakeman for protection, or was lulled into security by the absence of any warning. *Held*, the fact that the brakeman gave no warning did not relieve plaintiff from the charge of negligence.

(Argued October 28, 1887; decided December 6, 1887.)

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 13, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the material facts are stated in the opinion.

O. W. Chapman for appellant. Plaintiff was clearly chargeable with contributory negligence, in not looking easterly while he was going through the opening in the train of box cars, or when emerging through such opening, or while he was walking across the clear open space between the two tracks. (*Salter v. U. & B. R. R. Co.*, 75 N. Y. 273, 279.) The fact that the bell was not rung did not excuse plaintiff from looking easterly while he was emerging from and after he got through the opened train. (*Wilcox v. Rome & W. R. R. Co.*, 37 N. Y. 358; *Havens v. E. R. Co.*, 41 id. 296; *Haight v. N. Y. C. R. R. Co.*, 7 Lans. 11; *Davey v. L. & S. W. R. Co.*, L. R., 11 Q. B. Div. 213; 49 Law T. Rep. [N. S.] 739; *Stubby v. London & N. W. R. R. Co.*, Law Rep. 1 Exch. 13; *Cordell v. R. R. Co.*, 75 N. Y. 330; *Reynolds v. R. R. Co.*, 58 id. 248; *Byrne v. R. R. Co.*, 83 id. 620; *Woodard v. N. Y., L. E. & W. R. R. Co.*, 25 Week. Dig. 115.) The court erred in leaving to the jury the question whether the plaintiff had the "right to rely on the fact that it was the duty of the brakeman" to warn him. (*Wilcox v. Rome & W. R. R. Co.*, 39 N. Y. 358; *Ernst v. H. R. R. Co.*, 39 id. 51.)

S. C. Millard for respondent. A railroad company has not discharged its whole duty to the public by simply ringing the bell or blowing the whistle before passing over the crossing. It must exercise reasonable care. (*Zimmer v. N. Y. C. R. R. Co.*, 7 Hun, 552; *Cheney v. Same*, 16 id. 415; *Grippen v. Same*, 40 N. Y. 46.) Irrespective of any city ordinance, the running of railroad trains at an excessive rate of speed at crossings is negligence. (*Massoth v. Del. & H. C. Co.*, 64

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N. Y. 524; *Grippen v. N. Y. C. R. R. Co.*, 40 id. 46; *Beisiegel v. Same*, id. 9; *Cheney v. Same*, 16 Hun, 415; *Borst v. L. M. & S. R. Co.*, 4 id. 347.) Courts should not nonsuit where any possible inference can be drawn from any of the testimony, or any of the facts established upon the trial, which would relieve from the charge of contributory negligence. (*Salter v. U. & B. R. R. Co.*, 88 N. Y. 42; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 id. 464; *Kellogg v. Same*, id. 72; 78 id. 518; 75 id. 320; 71 id. 285; 34 id. 622; 20 id. 66.) If the plaintiff, under the peculiar circumstances in which he was placed, acted as would an ordinarily careful, prudent man under similar circumstances, then he was not guilty of contributory negligence. (*Salter v. U. & B. R. R. Co.*, 88 N. Y. 51; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 id. 76.) In any event, whether or not he was guilty of negligence was a question for the jury. (*Greany v. L. I. R. R. Co.*, 101 N. Y. 420; *Glushing v. Sharp*, 96 id. 677; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 id. 464; *Kellogg v. Same*, 79 id. 73; *Terry v. Jewett*, 78 id. 342; *Salter v. H. R. R. Co.*, 88 id. 50; *Yost v. Same*, 80 id. 622; *Shaw v. Jewett*, 86 id. 616; *Massoth v. D. & H. C. Co.*, 64 id. 529; *Cranston v. N. Y. C. & H. R. R. Co.*, 39 Hun, 308; *Cary v. Man. R. R. Co.*, 22 Week. Dig. 321; *Tallman v. Syracuse, B. & N. Y. R. R. Co.*, 98 N. Y. 198; 56 id. 542; 4 Hun, 34.) The plaintiff was not guilty of contributory negligence. (34 N. Y. 622; 32 id. 600; 20 id. 65; 35 id. 79; 51 id. 544; 58 id. 626; 60 id. 633; 64 id. 524; 79 id. 464; 84 id. 244; 96 id. 676; 90 id. 560; 101 id. 420; 19 Hun, 32.) The standard by which his conduct was to be judged was that of an ordinarily careful, prudent man. (*Salter v. U. & B. R. R. Co.*, 88 N. Y. 42; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 id. 76.) It was a question for the jury to say what a prudent man would have done under all the facts and circumstances. (*Weber v. N. Y. C., etc., R. R. Co.*, 58 N. Y. 455, 456; *Kissinger v. N. Y. & H. R. R. Co.*, 56 id. 538; *McGovern v. N. Y. C., etc., R. R. Co.*, 67 id. 417; 79 id. 72; 72 id. 468; 42 Hun, 306; 96 N. Y. 676; *Warner v.*

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D., L. & W. R. R. Co., 80 id. 218; *Beiseigel v. Same*, 34 id. 622; *Greany v. L. I. R. R. Co.*, 100 id. 419; *Sherry v. N. Y. C., etc., R. R. Co.*, 104 id. 652.) Whether or not plaintiff should have stopped after passing through the opening in the train of box cars and looked to the east was a question for the jury. (*Sherry v. N. Y. C., etc., R. R. Co.*, 104 N. Y. 652; *Greany v. L. I. R. R. Co.*, 101 id. 419; *Glushing v. Sharp*, 96 id. 676; *Beiseigel v. N. Y. C. R. R. Co.*, 34 id. 624; *Salter v. U. & B. R. R. Co.*, 88 id. 42; *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 id. 76; *Stackus v. Same*, id. 464.) When in an action of this kind there is any evidence, direct or inferential, of care or caution on the part of the person injured, the question as to contributory negligence is for the jury. (*Greany v. L. I. R. R. Co.*, 101 N. Y. 419; *Stackus v. N. Y. C., etc., R. R. Co.* 79 id. 464.) In determining whether or not the plaintiff should have stopped after having passed through the opening, or whether or not plaintiff was guilty of contributory negligence in not so stopping, the conduct of the brakeman cannot be overlooked or ignored. (*Glushing v. Sharp*, 96 N. Y. 676.) Plaintiff had a right to infer that there was no train approaching from either direction. (101 N. Y. 419; *Glushing v. Sharp*, 96 id. 676; *Kissmeyer v. N. Y. & H. R. R. Co.*, 56 id. 543; *Lindeman v. N. Y. C., etc., R. R. Co.*, 42 Hun, 306; *McGovern v. Same*, 67 N. Y. 417; *Borse v. L. S. & M. S. R. R. Co.*, 4 Hun, 346; 79 N. Y. 76.)

EARL, J. This action was brought to recover damages for injuries received at a railroad crossing. The defendant's railroad passed east and west through the city of Binghamton, with two tracks, and Oak street passed north and south intersecting the railroad. The south track was used for eastward bound trains and the north for westward bound trains, and the space between the two tracks was about seven feet. The accident occurred about fifteen minutes after six o'clock, P. M., on the 24th day of August, 1881, before sundown on a clear day. There was a freight train standing upon the south track headed

east which had been cut in two at Oak street, leaving a space of about twenty feet for the passage on the street of persons and teams. The plaintiff, going north in the center of the street, passed through this space and just as he stepped upon the north track was hit by an engine going west and was badly injured.

There was conflict in the evidence as to the defendant's negligence, and since the verdict of the jury it must be assumed that that was sufficiently established. But there was no conflict in the evidence as to the material facts bearing upon the plaintiff's contributory negligence. He was in possession of all his faculties, on foot, entirely unencumbered, with nothing to attend to but his own safety. There is a great preponderance of evidence that he could have seen the train for at least one-third of a mile before it reached Oak street, while he was passing over a space of about sixty feet, until he came within about fifteen feet of the south track of the railroad. But the plaintiff testified that he looked while passing over that space, and did not and could not see the approaching train, and we must, therefore, take the fact to be that he could not have seen the train until he had passed over or nearly over the south track. The north track was straight for at least half a mile toward the east and the moment the plaintiff got upon the middle of the space between the two tracks he could have seen a train approaching from the east for that distance. He was walking very rapidly, perfectly familiar with the location and the use which was ordinarily made of the two tracks, and as he crossed through the opening between the parts of the standing freight train, instead of looking east from which a train would ordinarily come on the north track, he looked to the west and heedlessly stepped immediately in front of the engine. As he passed over the north rail of the south track a single glance to the east would have disclosed to him the approaching train and he would have escaped injury. He was in a place of some peril in crossing these tracks and should have taken some care to protect himself. He was in no danger from the train on the

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south track as that was stationary. If that to some extent obstructed his view upon the north track, there was so much greater reason for him to take an observation the moment he had crossed the south track, so as to see whether he could cross the north track with safety, and for not doing so he is chargeable with contributory negligence, which bars his recovery. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Woodard v. N. Y. L. E. & W. R. R. Co.*, 106 id. 369; *Davey v. London & S. W. R. Co.* [L. R.] 11 Q. B. Div. 213; *S. C.*, affirmed in Court of Appeals, 49 L. T. Rep. [N. S.] 739.)

But there is a circumstance to which the trial judge attached some importance, but for which, as we must infer from the language of his charge, he would have non-suited the plaintiff, to which we must now call attention. There was a brakeman upon the south track in or near the opening between the two parts of the standing freight train. The evidence on the part of the defendant is, that the brakemen warned the plaintiff and attempted to arrest his progress. The evidence on the part of the plaintiff tends to show that the brakeman said nothing and made no sign to the plaintiff, and we must assume his evidence to be true. But it does not appear that the brakeman was stationed there for the purpose of warning travelers upon the street of the approach of trains upon the north track, or in any way for the protection of travelers. He was there simply for the purpose of connecting the two parts of the train when he should be signalled to do that, and hence he omitted no duty resting upon him in not warning the plaintiff. It does not appear that the plaintiff knew he was a brakeman, or that he understood that he was standing there to warn travelers upon the street, or that he supposed that he owed him any duty whatever. And it does not appear that the plaintiff relied upon him for protection, that he was lulled into a sense of security by the absence of any warning, or that his conduct was in any way influenced by his presence there. The plaintiff passed on through the opening apparently giving heed to nothing, at a rate of speed characterized by the trial judge as

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"almost approaching a run." It is, therefore, impossible to perceive how the presence there of the brakeman relieved the plaintiff from the duty of the vigilant use of his senses to secure his own safety. If the brakeman had in any way invited the plaintiff to cross or had given him any assurance that it was safe to cross, the case would be different. The case would also be different if the plaintiff had known that the brakeman was placed there to warn travelers of the approach of trains, and if as he approached, the brakeman seeing him had given him no warning. It may be that in such a case it would have been a question of fact for the jury to determine whether or not the plaintiff was guilty of negligence in crossing without looking for himself to see whether a train was approaching. It was, however, after great consideration held otherwise in the case of *Davey v. London & South-western Railway Company* (*supra*), which is singularly like this. There the defendant's railway crossed a public footway on the level. The plaintiff, a foot passenger, while in the day time crossing from the down side to the up side of the railway was knocked down and injured at the crossing by a train of the defendant on the up line. Owing to the position of certain buildings which stood by the line, it was impossible for any one crossing from the down line, to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six foot, had a clear and uninterrupted view up and down the line several hundred yards. The plaintiff stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine driver did not whistle. There was a servant of the company employed as a gate-keeper at the crossing, standing near the crossing, but he gave no warning to the plaintiff that a train was coming. The plaintiff was non-suited, and the court held, among other things, that the presence of the gate-keeper, who gave no warning, did not excuse the plaintiff from looking out for his own safety.

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We are, therefore, of opinion that the plaintiff should have been non-suited, and hence the judgment should be reversed, and a new trial granted, costs to abide event.

All concur, except DANFORTH, J., dissenting.

Judgment reversed.

EMILY ROCKAFELLOW, Appellant, v. SAM H. MILLER et al.,
Respondents.

In January, 1873, defendant M. and one E. formed a copartnership under the firm name of M. & E., the profits of the business to be divided equally. It was agreed between E. and one F. that the latter should receive E's share of the profits with certain exceptions. This agreement was assented to by M. upon condition that it should in no respect conflict with or affect the rights secured by the copartnership articles. After the expiration of the term of the copartnership E's connection with the business ceased and it was carried on by M. individually, but in the firm name, he retaining and using as his own the firm assets; he subsequently made an assignment to C. for the benefit of creditors. Plaintiff commenced an action against M. and F. as joint debtors, the summons in which was served upon F. Judgment was recovered and execution issued against their joint property and the individual property of F. On its return *nulla bona*, this action was brought by plaintiff as such judgment-creditor against M. and C. to set aside the assignment. The court found that F. knew of the intended assignment and ratified it. *Held*, that the complaint was properly dismissed; that the agreement between E. and F. did not make the latter a member of the firm or give him any interest in the firm business, which could be reached by a creditor of his until after the firm debts had been satisfied.

(Argued October 19, 1887; decided December 13, 1887.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made March 23, 1885, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

Frank J. Dupignac, for appellant. Whatever the relations of Miller & Faulkner, as between themselves, as to third

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persons, they were by reason of Miller's acts and declarations to those dealing with the business jointly liable as partners. (1 Collyer on Part. [6th ed.] 18 n.; id., 14; *Conklin v. Barton*, 43 Barb. 435; *Willard v. Rodwick*, 51 id. 616.) The agreement between the parties, and their intent as gathered from those agreements, and their acts taken in connection therewith must control and is the only evidence of the real status of the parties as to each other. (*Salter v. Ham*, 31 N. Y. 321; *Hazard v. Hazard*, 1 Story [U. S.] 371; *Coulter v. Thomas*, 25 Vt. 73; *Robbins v. Laswell*, 27 Ill. 365; *Stevens v. Faucett*, 24 id. 483; *Phillips v. Phillips*, 49 id. 437; *Niehoff v. Dudley*, 40 id. 406; *Lintner v. Milliken*, 47 id. 178; *Clark v. Reed*, 11 Pick. 446.) There must be a joint ownership of partnership funds, as well as an agreement to participate in the profits and losses, to constitute a partnership as between the parties themselves. (1 Coll. on Part. [6th ed.] 10; *Chase v. Bennett*, 4 Paige, 148; *Holmes v. U. Ins. Co*, 2 Johns. C. 329; *Post v. Kimberly*, 9 Johns. 470; *Cassidy v. Hall*, 97 N. Y. 159.) In a partnership the partners may stipulate simply as to profits, where one is to furnish all the materials, while both may bestow labor. In such a case the only specific interest of all is in the profits; while as to property the partnership is only in the employment of it. (*Penny v. Black*, 9 Bosw. 310.) A partnership in profits may exist as between the partners without all of them having title in the property out of which the profits are made. (*Moore v. Huntington*, 7 Hun, 425.) The right to an accounting between two or more persons is based on an element of a trust relationship which was not involved in this case. (1 Story on Eq. Jur., § 462; *Kelly v. Kelly*, 3 Barb. 419; *Menagh v. Whitwell*, 52 N. Y. 146; *Weidewaz v. Jacques*, 18 W. Dig. 240.) Miller, as the agent of Folk, was clothed with no power or authority to execute the assignment. (*Stringham v. St. N. Ins. Co.*, 4 Abb. Ct. App. Dec. 315; *Townsend v. Corning*, 23 Wend. 435; *Wilks v. Back*, 2 East, 142; *Worrall v. Munn*, 5 N. Y. 229.) The assignment puts Miller's individual personal creditors on a par with those of the firm, and this

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vice condemns every part of the instrument. (*Nat. Bk. v. Cohn*, 25 W. Dig., 437.)

Frederick G. Dow for respondent. Miller and Folk were not partners. (*Burnett v. Snyder*, 76 N. Y. 344; *Richardson v. Hughett*, id. 55; *Curry v. Fowler*, 87 id. 33.) Folk could not by force of the assignment be compelled to become a partner even if all of Eastmead's interest had been assigned and Eastmead had actually retired, unless he so elected; such an absolute assignment and retirement, at most, would have worked a dissolution of the partnership, and Miller and Folk would have remained as tenants in common of the partnership property. (Story on Part. [3d ed.], § 308; *Marquand v. N. Y. Mfg. Co.*, 17 Johns. 525; *Burnett v. Snyder*, 81 N. Y. 550.) The intention of the parties is controlling. (*Salter v. Ham*, 31 N. Y. 321; *Hazard v. Hazard*, 1 Story C. C. 371; *C. C. Sav'gs B'k v. Walker*, 66 N. Y. 424; Coll. on Part. § 78.) On the 18th of July, 1882, the date of the assignment, Folk and Miller were not partners *inter sese*, and such being the case, Miller had a perfect right to make the assignment. (*Adee v. Cornell*, 25 Hun, 78.) The general assignment, even if invalid when made, was subsequently rendered legal and efficient by the assent and ratification of Folk. (*Adee v. Cornell*, 93 N. Y. 572.)

DANFORTH, J. The plaintiff, claiming to be a creditor of Sam. H. Miller and Jesse E. Folk, after service of the summons on the defendant Folk, recovered judgment against them as joint debtors in the sum of \$1,064.48. Execution issued against the joint property of Miller and Folk, and the individual property of Folk was returned *nulla bona*. This action was then brought by the plaintiff as such judgment creditor against Miller and one John C. Cook. Its object was to set aside an assignment made by Miller to Cook, as assignee, for the benefit of Miller's creditors. The case was tried at Special Term, and judgment of dismissal ordered in favor of the defendants. The conclusion of the trial judge upon the evi-

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dence was satisfactory to the General Term, and an examination of the record discloses no finding that is not supported by testimony. We have only to see whether, upon these findings, any error was committed by the trial judge in his conclusion of law.

It appears that on the 1st of January, 1873, the defendant Miller and one Eastmead formed a partnership under the firm name of Miller & Eastmead, to commence at that time and terminate on the 31st of December, 1877. The profits of the business were to be divided equally. It was agreed between Eastmead and Folk that Folk should receive such share of the profits of the business of Miller & Eastmead as should accrue to Eastmead, leaving it to the discretion of Folk as to the portion which Eastmead should retain, such portion, however, not to be less than one-fifth. This arrangement between Eastmead and Folk was assented to by Miller upon condition that the agreement should in no respect conflict with the conditions or terms of copartnership between himself and Eastmead, or in any respect invalidate or prejudice the rights secured by the copartnership articles. Folk did not become a partner in said firm, nor did either of the parties thereto intend that he should. The business was continued by Eastmead & Miller until December 31, 1877, when the copartnership expired by limitation, and Eastmead's connection with the business ceased. After that time and until the 18th of July, 1882, the business was continued by Miller individually, but in the name of Miller & Eastmead; the property and assets theretofore belonging to or used in the business were employed and possessed by Miller as his own. On the 18th of July, 1882, he executed an assignment of all his property to the defendant Cook for the benefit of his creditors. The trial judge found that the assignment was in all respects lawful, just and fair, and was made by Miller and accepted by Cook in good faith and without any fraud. Upon these facts it necessarily followed that the plaintiffs' action failed. The arrangement between Eastmead and Folk, as it was not intended to, so it did not give Folk any right or interest in

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the firm business, nor did it make him a member of the firm of Miller & Eastmead. His profits were to come, not from the firm, but from Eastmead, and the case is brought directly within our decision in the case of *Burnett v. Snyder* (76 N. Y. 344).

There are further facts found by the trial judge, in effect that Folk knew of the intended assignment and ratified it; but that is unimportant, since, in the other view, he had no interest whatever in the business of the firm, nor any right which could be reached by a creditor until after the firm debts had been satisfied. Whatever claim he had was against Eastmead, with whom alone he had contract relations. We think the trial judge properly dismissed the complaint, and that the General Term committed no error in affirming its decision.

The judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed

ANN MCGREGOR, Appellant, v. THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, Respondent.

Plaintiff leased certain premises, which had been occupied as a dwelling-house to defendant, to be used as a public school. The requisite alterations in the interior were permitted by the lessor and the lessee covenanted to make them and also to surrender the premises at the expiration of the lease "in the same condition as they were at the execution of this lease, reasonable use and wear thereof as a public school and damages by the elements excepted." The lessees changed the dwelling-house into school rooms, removing partitions, etc. This lease was followed by three others in similar form, each executed before the termination of the preceding one. After the termination of the last lease and the surrender of the premises, this action was brought, among other things, to recover damages for a breach of the covenants as to condition on surrender. Plaintiff proved that the premises were in good condition when leased, and that when surrendered the walls, floor and glass in the windows were broken, the basement filled with refuse and the sidewalk broken by dumping coal thereon, some of the balusters of the stairs gone, etc. *Held*, that defendant was not bound to restore the premises to their former condition as a

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dwelling-house; but that the evidence showed other damages, and the question as to whether or not they resulted from a reasonable use of the premises for school purposes was one of fact, and a submission of the same to the jury was proper.

Also, *held*, that plaintiff was not required to show the separate damage at the end of each term; it was sufficient to prove a breach of covenant, referable to one or more or all of the leases; also, that the delivery of each new lease was not a waiver, and did not estop plaintiff from claiming a breach of the covenant in the former one.

The rule that where there has been an implied surrender of possession by a tenant, by acceptance of a new lease, he loses all rights dependent upon the continued existence and validity of the surrendered lease, applies simply to such rights as can exist only while the lease continues; it does not extinguish rights of action already accrued.

(Argued October 24, 1887; decided December 18, 1887.)

APPEAL from order of the General Term of the Court of Common Pleas in and for the city and county of New York, made May 15, 1885, which reversed a judgment in favor of plaintiff entered upon the report of a referee. (Reported below, 13 Daly, 195.)

The nature of the action and the material facts are stated in the opinion.

John J. Macklin for appellant. The plaintiff had a right to recover damages in consequence of the failure of the defendant to return the premises in condition fitted for dwelling purposes, as he had received them. (*Marvin v. Stone*, 2 Cow. 781; *Ripley v. Larmouth*, 56 Barb. 21; *McAdam's Land. & Ten.* [2d ed.] 149; *Benton v. Marvin*, 52 N. Y. 570; *Bookstaver v. Jayne*, 60 id. 146; *Remington v. Palmer*, 62 id. 31; *Springstein v. Sampson*, 32 id. 703; *Reynolds v. C. Ins. Co.*, 47 id. 597.) The exception, reasonable use and wear thereof as a public school only meant the natural and unavoidable decay or depreciation arising from accidental causes in using the premises as a school. (Taylor, §§ 327, 357, 360, 362, 364, 367; *Lochrow v. Horgan*, 58 N. Y. 635; *McAdam* [2d ed.], 146, 147, 304, 406; *Suydam v. Jackson*, 54 N. Y. 450, 453; *Waring v. Hutchins*, 5 Barb. 666.) A liability for the breach of a contract cannot be released excepting by an instrument under seal, or by the acceptance of something in

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satisfaction of the wrong done (*McKnight v. Dunlap*, 5 N. Y. 537), and the cancellation of the instrument itself, which contains the covenant, is not a discharge of liability for an existing breach. (*Roe v. Conway*, 74 id. 201, 206; Comyn on Cont., 47; *Crawford v. Millsbaugh*, 13 Johns. 87; *Allaire v. Whitney*, 1 Hill, 484.) The claim that there was a waiver or release of liability is an affirmative defense, and the facts upon which it was based must be specially pleaded, otherwise it is not available. (*McKyring v. Bull*, 16 N. Y. 297.)

D. J. Dean for respondent. The giving and acceptance of a new lease was in each case a surrender of the lease previously in force. (*Livingston v. Potts*, 16 Johns. 78; *Springstein v. Schermerhorn*, 12 id. 357; *Loughran v. Ross*, 45 N. Y. 792; *Coe v. Hobby*, 72 id. 145.) There having been a surrender of each of the leases, excepting the last, the landlord let the premises and the tenant occupied them under a new tenancy in each successive instance, and the rights which existed under the former tenancy not being expressly retained in the new lease, must be deemed to have been abandoned. (*Watriss v. First Nat. B'k*, 124 Mass. 571; 26 Am. R. 694; *Harris v. Hiscock*, 91 N. Y. 340; *Tice v. Zinsser*, 76 id. 549.) The plaintiff must be deemed, from all the circumstances of the lease, to have waived the alleged violation of the covenants contained in the first three leases, and is estopped from claiming any damage by reason thereof. (*Townsend v. Scholey*, 42 N. Y. 20; *De Herques v. Marti*, 85 id. 609; *Conger v. Duryee*, 90 id. 594; *Murray v. Harway*, 56 id. 337; *Camp v. Pulver*, 5 Barb., 91; *Ireland v. Nichols*, 46 N. Y. 413; 2 Sweeny, 289; *Collins v. Hasbrouk*, 56 N. Y. 157.) To allow the plaintiff to claim damages because the building restored to her in November, 1881, was not in the same condition in which it was in 1874, when by her own act she had leased it in April, 1881, stipulating only that it should be returned in the condition in which it then was, there being no evidence as to what that condition was, would be to make a new contract between the parties and enforce a

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covenant that neither of them had in mind. (*Witty v. Matthews*, 52 N. Y. 512; *Dunn v. Sayles*, 5 Q. B. 685; *Aspdin v. Austin*, id. 671; *Standen v. Christmas*, 10 id. 135; *Churchward v. Ford*, 2 H & N. 446.)

FINCH, J. This action was brought by a landlord against a tenant upon covenants contained in leases. The plaintiff rented the premises to the defendant to be used for the purposes of a public school. Alterations in the interior to accommodate that use were permitted by the lessor to be made by the lessee, and were alike contemplated by each when the contract was made. A printed form of lease was used to contain and express the agreement from which the clause forbidding alterations was stricken out before execution. There was also an express covenant that the lessee should make all requisite alterations, and a further covenant on its part to surrender the premises at the expiration of the lease "in the same condition as they were at the execution of this lease, reasonable use and wear thereof as a public school and damages by the elements excepted." The lessee entered and changed the dwelling-house into school rooms, removing partitions and making alterations necessary for the new use. This lease was followed by three others in similar form, each executed before the termination of its predecessor, and the last one ending the term on November 1, 1881. The complaint set out the lease and continued occupation and alleged a breach of the covenant for restoration, averring that "the premises were left in a condition utterly unsuitable for a dwelling-house" and "uninhabitable for any purpose," and that water taxes to the amount of about \$96 had been left unpaid, and settled by the lessor. The answer took issue upon these allegations, but was followed by an offer of judgment for \$125 and costs to that date. The offer was not accepted and the action went to trial. The plaintiff gave no proof of the condition of the premises at the date of the letting beyond the fact that they were then in the form of a dwelling-house, the rooms in which had been previously let to several occupants, and the general

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statement of one witness that the premises at that time were "in excellent condition," and the pavement in front of the premises was "in good condition." This witness, at the date of the lease, was a child about eleven years old, living in the adjoining house, but saying she "used to go through the premises in question," "playing with the other children there." This evidence, although very weak in itself, was, in no respect, controverted, and sufficiently established that the premises were in good condition when leased. The plaintiff then proved the condition of the building after it was surrendered by the defendant. The witness said "the walls were broken, the floor was broken, the basement was used for refuse." She added that the sidewalk was broken by the dumping of coal upon it. The plaintiff further proved the payment by her of Croton water rents amounting, with interest, to \$103, and repairs of the sidewalk to the amount of \$40, and then called two witnesses, a carpenter and mason, who testified to the condition of the premises when finally surrendered. They said the first floor had sagged from the removal of partitions and was almost worn through; that the shutters were in bad condition; that the glass in the windows was in many cases broken; that the mantel pieces were in bad order; that the walls and ceiling had been boarded over, the nailing going through the plastering; that the balusters of the stairs were loose and some missing; and that the cellar was full of rubbish.

At the close of the plaintiff's case the defendant consented that judgment might be given for the water rent and interest, but as to the remaining causes of action moved for a dismissal of the complaint upon three grounds, which motion was denied. These grounds were as follows: First, that no violation of the covenant had been shown since the lease contemplated alterations in the premises, and that they were to be used as a school. This ground was not sufficient to justify a dismissal of the complaint. Granting that the defendant was not bound to restore the premises to their former condition as a dwelling-house, which under the terms of the leases, we deem a correct proposition, it is still true that damages to the premises were proved which

were not the effect or result of the alterations. Whether these injuries did or did not flow from a reasonable use of the premises for school purposes, was a question of fact, and proper to submit to the jury. They might easily think that broken window panes, battered doors, missing balusters, filthy walls, and a cellar filled with refuse, did not result from such reasonable use, and so was not excused by the terms of the lease.

The second ground of nonsuit is one which the General Term sustained in their reversal of the verdict. It was that no violation of the covenant in the last lease had been shown, and there was a waiver of such violation of the covenants in the prior leases. The fourth and last lease was dated April 16, 1881, and its covenant of restoration was to the condition of that date and such condition was wholly unproved. But the complaint relates to a continuous possession under all the leases, and while the plaintiff did not show the separate damage at the close of each term, and so prove four distinct causes of action, she did prove a breach of covenant referable to some one or more, or all of the leases, and it is quite immaterial which since the covenant existed and was the same in each. The alleged acts of waiver may be considered in connection with the second and third grounds of the defendant's motion, which were in substance, that each new lease was a surrender accepted of the prior one, and she is estopped from asserting a violation of the covenants in the leases ended by such accepted surrender.

It is, perhaps, true that each new lease involved a surrender to the landlord of the lessee's possession under the prior one, though they all ran to their termination, and there was no surrender of the leases themselves. (*Livingston v. Potts*, 16 Johns. 28; *Springstein v. Schermerhorn*, 12 id. 357.) But such surrender, instead of being actual, was implied from the presumed intention of the parties, and devised to give consistency to the new lease. I think it never should be made to work an injustice to the contracting parties in hostility to their real agreement. It is also true that, where there has been such implied surrender, the tenant loses all rights

dependent upon the continued existence and validity of the surrendered lease. (*Loughran v. Ross*, 45 N. Y. 792.) But that is because the right lost or extinguished could not survive the destruction of the lease and the ending of its term, and could exist only while the lease continued. Taking the new lease and ending the old one destroyed the right to remove buildings or the right to estover dependent wholly upon the ended lease. And I cannot discover that the doctrine ever went further and sufficiently to include the present case. Certainly a surrender of the lease during the term, and its acceptance by the landlord, does not extinguish rights of action already accrued. We have held that as to rent in arrears and overdue. (*Sperry v. Miller*, 16 N. Y. 407.) And where, at the close of a term, there is surrender of possession by a tenant in such condition as to violate a covenant in the lease, and an acceptance of possession by the landlord, the two things occurring *eo instanti*, I am not ready to admit that the right of action for a breach dies at the moment of its birth. It is true that the landlord accepting the possession with knowledge of the facts or full opportunity to know, and without protest or claim of injury or of violated covenants, may be deemed to have admitted performance of the covenant and waived any right of action for its breach; but the mere acceptance of possession in and of itself dissevered from the surrounding circumstances which characterize and qualify it, I think, should not produce that result. At least, it should not flow from a mere technical or implied surrender, where there is, of course, neither opportunity of knowledge nor occasion for protest, and where, as here, consecutive leases operate in effect as renewals and produce in substantial result one unbroken and continuous term. We are of opinion that the question of breach in the condition of the premises should relate to the final and actual surrender, and not be controlled by the legal and technical surrenders occurring along the line.

The verdict of the jury when compared with the evidence indicates that they awarded nothing for the defendant's failure to restore the premises to the condition of a dwelling-house and the charge of the courts seems to have assumed that such

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would be their action. But if the fact were otherwise the result would not be changed, for the defendant raised no objection to the evidence and took no exception to the charge of the court, and made no request that the jury should confine their verdict to damages outside of the alterations. The plaintiff did request a charge that injuries resulting from failure to restore the premises to the condition of a dwelling-house should be awarded, which the court declined by saying that the whole covenant had been read to the jury. Neither side took any exception. Since there was evidence proper to go to the jury and a question for them to decide, and no exception was taken to the manner of the submission the verdict must stand. If they were left to determine a question of law as well as one of fact, it is a sufficient answer that both sides acquiesced by making no objection.

The judgment of the General Term should be reversed, and that of the trial court affirmed with costs.

All concur.

Judgment reversed.

MATTHEW WHITE, Appellant, v. MICHAEL KUNTZ et al.,
Respondents.

A creditor who, in executing a composition agreement, has been guilty of fraud in respect to the other compounding creditors, by secretly stipulating for a preference to himself, may not avoid the agreement, because of a similar fraud practiced upon him.

The composition agreement is only void as to the innocent creditors executing it.

It seems an innocent creditor, upon repudiating the composition agreement, is restored to the right to enforce his original claim.

Any contract or promise, whereby one of the compounding creditors secretly secures to himself an advantage over the others, and any security given upon any such contract or promise, is void.

It seems that any security taken by one of the compounding creditors, even for the sum payable to him under the composition agreement, aside from that which is common to all, if unknown at the time to the other creditors, is inoperative and void.

(Argued November 28, 1887, decided December 13, 1887.)

107	518
109	608
107	518
142	411

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APPEAL from order of the General Term of the Court of Common Pleas in and for the city and county of New York, made June 25, 1885, which affirmed an interlocutory judgment sustaining a demurrer to plaintiff's complaint. (Reported below, 13 Daly, 286.)

This action was brought against the defendants, Joseph Kuntz, Louis F. Kuntz and Michael Kuntz, about the 1st day of January, 1882, and an amended complaint therein was served in the latter part of March, 1884. The complaint alleges that at the commencement of the action and for five years prior thereto the plaintiff was a malster; that Joseph and Louis F. Kuntz were brewers in the city of New York; that prior to the 3d day of January, 1881, the plaintiff sold and delivered to J. & L. F. Kuntz a large quantity of malt for which they gave him two promissory notes, one dated December 7, 1880, for \$5,446.84, and the other dated January 3, 1881, for \$12,714.80, each payable four months after date; that the notes were not paid at maturity, that in April, 1881, J. & L. F. Kuntz failed and made an assignment for the benefit of their creditors to their father, Michael Kuntz; that afterward certain of their creditors executed a composition agreement whereby they agreed with them and with each other, to accept from them in full satisfaction in discharge of all their demands thirty-three and one-third cents for each dollar due them, to be paid in notes of J. & L. F. Kuntz payable in four equal installments, in two, three, four and five years from May 2, 1881, to the order of Michael Kuntz, and to be by him indorsed, the delivery of which was to operate as a complete release and discharge of all the demands of the creditors signing the agreement: that in pursuance of the composition agreement four notes as therein stipulated were executed and delivered to the plaintiff, each for \$1,513.47 and indorsed by Michael Kuntz; that prior to the signing of the composition agreement on the 28th day of April, 1881, and as a consideration to the plaintiff for signing the same, Michael Kuntz signed, sealed and delivered to the plaintiff another agreement by which he was to purchase from the plaintiff the four composition notes,

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and to pay him therefor the sum of \$10,000, as follows: The sum of \$2,500, on the 1st days of June, September and December, 1881, and the sum of \$2,500 on the 1st day of March, 1882; that on or about the 19th day of July, 1881, the plaintiff tendered the composition notes to Michael Kuntz and demanded the payment of the first installment of \$2,500, under his agreement payable on the 1st day of June, 1881; that payment was refused and that Michael Kuntz refused to perform his agreement of April 28, 1887, alleging that the same was null and void. The balance of the complaint is as follows:

"*Fourth.* The said plaintiff further alleges on information and belief that several signers of the so-called composition agreement, dated April 19, 1881, a copy of which is hereto annexed, were induced to sign and did sign the said agreement under an agreement and promise on the part of the said Michael Kuntz to pay them a larger percentage than one-third of their said debts, and for and in consideration of other inducements and advantages than were expressed in the said agreement, and that the said Joseph and Louis F. Kuntz were cognizant and had full knowledge and information thereof, and that the said defendants conspired together to procure the plaintiff's signature, and that of the others to the said agreement, fraudulently and by agreeing and stipulating to pay certain parties thereto a higher and larger percentage than was provided in and by the said agreement, and that such agreements, stipulations and contracts were fraudulently concealed from the said plaintiff, and that thereby the signature of the said plaintiff was fraudulently procured to be signed thereto, and that the said so-called agreement of composition is null and void and of no binding force upon the said plaintiff, and the same should be decreed to be null and void, and delivered up for cancellation, for the above and other reasons.

"That such agreements for larger payments were, as deponent is informed and verily believes to be true, made with the following and other signers to the said composition agreement, viz.: Evan and P. E. Thomas, Messrs. Rosenheim & Co., Thomas B. Tweddle and others.

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"*Fifth.* The said plaintiff further said that he now brings into court and will produce on the trial of this action or otherwise, and he now offers for cancellation and will produce on the trial of this action or otherwise for cancellation, the said four composition notes above set forth, upon which no payment has been made to the said plaintiff.

"And the said plaintiff further saith that he now brings into court, and will produce on the trial of this action or otherwise, and he now offers for cancellation and will produce on the trial or otherwise for cancellation the said covenant and agreement of Michael Kuntz, dated April 28, 1881, above set forth, and a copy of which is hereto annexed.

"The said plaintiff further alleges that he is without an adequate remedy at law in the premises; wherefore, the said plaintiff invokes the aid of this court in establishing and settling his rights in the premises under the fact above set forth and under the said several agreements, and he asks the decree and judgment of this court:

"*FIRST.* That this court should set aside and vacate the said so-called composition agreement by the creditors of J. & L. F. Kuntz, dated April 19, 1881, a copy of which is hereto annexed, as fraudulent and void, and that the same should be decreed to be delivered up for cancellation.

"*SECOND.* That this court should decide upon the status and condition of the said four notes given under the composition agreement to the said plaintiff, and should order the same to be delivered up, for cancellation, as being illegal and void.

"*THIRD.* That the court should decide upon the status and condition of the said Michael Kuntz' covenant and agreement given to the said plaintiff, and should order and decree that the same should be delivered up, for cancellation, as being illegal and void.

"*FOURTH.* That judgment should be rendered against the said Joseph and Louis F. Kuntz, and the representatives of the said Louis, for the said two original notes above set forth, for the sum of five thousand four hundred and forty-six dollars and eighty-four cents (\$5,446.84), with interest thereon from

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the 10th day of April, 1881, and for the sum of twelve thousand seven hundred and fourteen dollars and eighty cents (\$12,714.80), with interest thereon from the 6th day of May, 1881, with the costs of this action.

"FIFTH. That any other relief, judgment or decree should be rendered herein, which the court may deem consistent with equity and good conscience, and to which the plaintiff may be entitled on the facts of this case, with costs."

To this complaint the defendants demurred on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment given thereon in favor of the defendants.

William Barnes for appellant. It was necessary, before bringing this action, for the plaintiff to cancel the Michael Kuntz agreement and the composition notes. (*Nichols v. Michaels*, 23 N. Y. 264, 273; *Allerton v. Allerton*, 50 id. 670; *King v. Fitch*, 2 Abb. Ct. App. Dec. 508; *Gould v. Cay. Co. B'k*, 86 N. Y. 75, 80; *Am. W. Co. v. Brasher*, U. S. Ct. Court, Cal.; Daily Reg., 1882, p. 1028; 14 Rep'r, 609; *Pierce v. Wood*, 3 Fost. 519.) The defendants, J. & L. F. Kuntz, the sons, and Michael Kuntz, the father and general assignee of the firm having committed a double fraud in making the agreement with the plaintiff to pay him a larger sum than that stated in the composition deed, and in making agreements for the payment of larger percentages with divers other creditors, which were fraudulent as against the said plaintiff and other creditors, cannot now be permitted to assert the validity of the composition by which the plaintiff's original debt was in form released, and Michael Kuntz discharged from liability as general assignee for the benefit of creditors. (*Mallalieu v. Hodgson*, Ad. & El., N. R. 16 Q. B. 709, 712; *Wilson v. Ray*, 10 Ad. & El. 82; *P. & W. R. R. Co. v. Newark*, 13 How. 307, 313; 2 Smith's L. Cases, 818; *Mariner v. M. & St. P. R. R. Co.*, 26 Wis. 87.) Under the circumstances stated in the amended complaint and admitted of record by the demurrer, the contracts being executory, it is proper that

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the court should order the written instruments tainted by fraud to be surrendered and canceled, and should grant, if necessary, any other ancillary remedies in the premises. (3 Pomeroy's Eq. 457, 458; 2 Bacon's Abr. [London ed., 1798] 298, 321; Pollock, 519; 1 Story on Cont. [4th ed.] 594, § 492; id. 595; 2 Story's Eq. Jur. 6, § 694; *Taylor v. Bowers*, 16 Eng. R., Moak's Notes, 352, 356, 357; *Woodworth v. Bennett*, 43 N. Y. 273; *Welles v. Yates*, 44 id. 525; Dan forth's Dig. 486; *Allerton v. Allerton*, 50 N. Y. 670; *Gould v. Cay. Co. B'k*, 99 id. 333.) Assuming that neither party can legally enforce the Michael Kuntz agreement or the composition deed which was executed *pari passu* with it, and as a part of the same transaction, then it necessarily follows that the court should decree the cancellation of these papers and give judgment for the plaintiff upon the original notes of the defendants, J. & L. F. Kuntz. (Pollock's Prin. Cont. [Am. ed.] 248; *Howden v. Haigh*, 11 Ad. & El. 1039; *Higgins v. Pitt*, 4 Exch. R. 324, 325; *Knight v. Hunt*, 5 Bing. 434; *Beck v. Cole*, 4 Sandf. 79, 83; *Bell v. Leggett*, 7 N. Y. 179; Story on Cont., § 620; *Partridge v. Masser*, 14 Gray, 180, 182; *Hefter v. Cahn*, 73 Ill. 297, 301; *Pierce v. Wood*, 3 Fost. [N. H.] 519; 86 N. Y. 81; *Kahn v. Gumberts*, 9 Ind. 430, 432; *Leving v. Gale*, 28 id. 487; *St. John v. Benedict*, 6 Johns. Ch. 117; *Spurgeon v. McElwain*, 6 Ohio, 444; *Nellis v. Clark*, 20 Wend. 28; *Hoover v. Pierce*, 27 Miss. 13; *Wooster v. Eaton*, 11 Mass. 368; *Taylor v. Bowers*, 16 Eng. R. [Moak] 351-353, 356, 357; *Montefiori v. Same*, 1 W. Black. 364; *Sweet v. Tinslar*, 52 Barb. 271; *Gilmour v. Thompson*, 49 How. Pr. 198; *Jones v. Seward Co.*, 10 Neb. 158, *Maher v. H. Ins. Co.*, 67 N. Y. 292; *Willink v. Vanderveer*, 1 Barb. 607; *Gardner v. Heartt*, 3 Denio, 226; *Hendrix v. People*, 9 Brad. 45; *People v. Taylor*, 4 Park. Crim. R. 161; *Mech. B'k v. O. L. Ins. Co.*, 1 Disn. [O.] 472.)

A *Blumenstiel* for respondents. No action can be maintained upon the secret agreement of Michael Kuntz to pay \$10,000 for notes aggregating \$6,053.88, for that agreement

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was a fraud on the other creditors in that it provided for an extra, over and above the terms of the composition. (*Gilmour v. Thompson*, 49 How. 198-202; *Breck v. Cole*, 4 Sandf. 79; *Pinneo v. Higgins*, 12 Abb. 334; *Ahensen v. Darby*, 6 H. & N. 778; *Leicester v. Rose*, 4 East, 372; *Knight v. Hunt*, 5 Bing. 432; *Howden v. Haigh*, 11 Ad. & El. 1033; *Smith v. Cuff*, 6 Maule & S. 160; *Lawrence v. Clark*, 36 N. Y. 128; *Van Bokkelen v. Taylor*, 62 id. 105; *Hagaman v. Burr*, 41 Super. Ct. 423; *Williams v. Schreiber*, 14 Hun, 38; *Almon v. Hamilton*, 100 N. Y. 532; *Carroll v. Shields*, 4 E. D. S. 466; *Beach v. Ollendorf*, 1 Hill, 41; *Townsend v. Newell*, 22 How. Pr. 11.)

EARL, J. It is a general rule of law that the acceptance of a lesser sum, or an agreement to accept it, does not bar a demand for a greater sum. There is an exception to this general rule, however, in the case of a composition by a debtor with his creditors, in which they agree to accept less than their entire demands. Such an agreement, if entered into by a debtor with a number of his creditors, each acting on the faith of the engagement of the others, will be binding upon them, for each in that case has the undertaking of the rest as a consideration for his own undertaking. "Where creditors thus mutually agree with each other," says Mr. Justice DALY, in *Williams v. Carrington* (1 Hilton, 514, 519), "the beneficial consideration to each creditor is the engagement of the rest to forbear. A fund is thereby secured for the general advantage of all; and if any one of the parties were allowed afterwards to enforce his own claim, it would operate to the detriment of the other creditors who have relied upon his agreement to forbear, and might even deprive them of the sum it was mutually agreed they should receive by putting it out of the power of the debtor to carry out the composition." "Every composition deed," says Mr. Justice DUER, in *Breck v. Cole* (4 Sand. 79, 83) "is in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an

agreement that each shall receive the sum or the security which the deed stipulates to be paid and given, and nothing more; and that, upon this consideration, the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." It is, therefore, held that every agreement made by one creditor for some advantage to himself over other creditors who unite with him in a composition of their debts, is fraudulent and void. So scrupulous are courts in compelling creditors to the observance of good faith toward one another in cases of this kind, that any *security* taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown at the time to the other creditors, is void and inoperative; and no contract to pay money or do any other valuable thing, and no security given upon any such promise, whereby a creditor obtains an advantage peculiar to himself, can be enforced. (*Russell v. Rogers*, 10 Wend. 474, 479.)

Hence the agreement on the part of Michael Kuntz made with the plaintiff, without the knowledge and consent of the other creditors, to pay him \$10,000, for the four notes amounting to about \$6,000, was fraudulent and void and cannot be enforced. And the composition agreement as to all the innocent parties thereto was absolutely void, and they were left with the right to enforce their original claims as if they had never signed the agreement. If the plaintiff, therefore, were an innocent party, and guilty of no fraud, he could, first repudiating the agreement, have commenced an action at law upon his original notes, and have recovered judgment thereon, and the composition agreement would have been no defense as to him. But he is not an innocent party. He was himself guilty of the very fraud of which he complains, and he cannot therefore allege that he was induced to enter into the composition in consequence of any fraud practiced upon him. He executed the composition agreement knowing that there was not to be equality among the creditors and hence he cannot be permitted to complain that there was not such equality. Having himself taken a fraudulent advantage he cannot set up

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that other creditors also took a fraudulent advantage. Having made the best bargain he could for himself, he cannot complain that other creditors did the same. The only persons who can complain of these frauds are the innocent parties to the agreement. What then are the rights of the plaintiff in the dilemma in which he has been placed? He has not forfeited all claims upon his debtors, and there is no ground upon which he can be deprived of all remedy against them. He must either have the composition notes or his original notes. If as to him the composition should be held fraudulent and void, then he could not enforce the composition notes, but would inevitably be left with his action upon his original notes. Having by his signature to the composition induced other innocent creditors to sign also in the belief that all the creditors were to be treated alike, while in fact he was to receive a large advantage over them, he perpetrated one fraud upon them; and if he could now avoid the composition agreement as to him, and enforce his original notes for their full amount, he would perpetrate another fraud upon them, and take a still further advantage of them by depleting the very fund out of which alone perhaps the debtors would be able to fulfill the composition on their part. This he should not be permitted to do, and to defeat such an unjust result he should be held to the composition and his remedy upon the composition notes. The courts would not as between the parties guilty of the fraud, if their interests alone were to be affected, enforce or relieve from the composition agreement. But they will see to it, so far as they can, that the innocent parties are not made the victims of a double fraud, and this they will accomplish by holding the guilty parties to the composition agreement; and so it was held in *Mallalieu v. Hodgson* (16 A. & E. [N. S.] 690) a case quite analogous to this. There, as here, the plaintiff before signing a composition agreement stipulated for a secret advantage to himself, and so and some of the other creditors unknown to him, while it was represented to him by the debtors that all the other creditors were to have no more than the composition agreed upon. EARL, J., said: "Here the plaintiff having

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received the composition and the value of the preference, which was a fraud upon the other creditors, is seeking to gain a further exclusive advantage to himself, also in fraud of them, by suing for the balance of his original debt after allowing for the composition and the value of the preference, and claims to avoid his release on the ground that he was induced by the defendants to believe that he alone was fraudulently preferred, whereas some other creditors had also obtained some unjust advantage. But a deed is not to be avoided on the ground of a fraudulent misrepresentation, unless the matter misrepresented was a material inducement to the execution of the deed." COLERIDGE, J., said: "As the plaintiff was himself, in the transaction of the composition and release, guilty of fraud in respect to the other compounding creditors, by stipulating for a preference to himself, he is not at liberty to insist on the fraud at the same time practiced on himself; nor indeed to say that it is any fraud which induced him to enter into the composition. * * * The plaintiff in this case has entered into an arrangement for the compounding of his claim on the defendants which is fraudulent as regards the other creditors. He has received the composition notes and has executed a release; but he now resorts to his original demand, and is thereupon met by a plea of the release. *Prima facie* the release is an answer to the action, because to allow the plaintiff now to recover for his whole original demand would be a fraud on the other creditors who have come into the composition on the faith of the plaintiffs being a party to it." As to the secret advantage given to some of the other creditors to induce them to sign the composition, the learned judge further said: "The plaintiff has stipulated and obtained a preference for himself which for the reason I have stated, will not vitiate the release as against himself, and it appears to me that the having given a preference to others was also no fraud upon the plaintiff. A mere misrepresentation by the defendants of a fact not material to the plaintiff would not sustain the issue, and the only way in which the misrepresentation could be material to the plaintiff, would be inasmuch as the defendants might be

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rendered the less able to carry into execution the fraudulent preference to himself by having bound themselves to act similarly by others. But he had no right to have that preference carried into execution, and, therefore, is not in law prejudiced by a failure in regard to it. The whole consideration for his release is the fraudulent preference promised to himself, and the withholding any such preference from other creditors. He cannot allege the former as a fraud on himself to vitiate the release, for he is *particeps fraudis*, and the latter is so entirely mixed up with it, deriving all its materiality from it, that the same disability seems to exist as to it."

The plaintiff is, therefore, in a position where he is not permitted to allege that the composition agreement is invalid, and he cannot, therefore, enforce his original notes. His only remedy against the defendants is upon the composition notes.

Hence it is quite clear that this complaint does not state a cause of action against the defendants or any of them. The plaintiff upon familiar principles could not come into court and ask to have the agreement of Michael Kuntz dated the 28th day of April, 1881, cancelled. That agreement was fraudulent and void, and the parties thereto were *in pari delicto*, and the courts would not aid either of them to enforce or cancel it. Besides that agreement does not bind him to any thing and if he desires to be rid of it he can tear it up, and he does not need the aid of any court. For reasons already stated the court would not vacate the composition agreement as that is binding upon the plaintiff. The court would not cancel the composition notes and authorize the plaintiff to surrender them to the defendants because they are valid. The court could not for reasons already stated give the plaintiff judgment upon the original notes because they are released and discharged by the composition agreement. The court could not under this complaint, as it now stands, render judgment upon the composition notes because, besides other obstacles, at the commencement of this action neither one of them was due.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

HERMAN FUCHS, Respondent, v. THEODORE E. KOERNER.
Appellant.

Upon breach by an employer of a contract of employment, by a discharge of the employe before the expiration of his term of service, the latter is only bound to use reasonable diligence to procure other employment of the same kind in order to relieve the employer as much as possible from loss consequent upon the breach; he is not bound to look for or accept occupation of another kind.

(Argued November 28, 1887; decided December 18, 1887.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 15, 1885, which affirmed a judgment in favor of plaintiff entered upon a verdict. (Reported below, 20 J. & S. 77.)

This action was brought to recover damages for a breach of a contract of employment.

On the 9th of February, 1884, the defendant engaged the plaintiff "for his business in essential oils and essences for one year," from the 6th of February, 1884, for the yearly wages of \$1,800, in weekly payments of \$37.50. The plaintiff served under that agreement until July 6, 1884, when the defendant closed up his business, and for that reason discharged the plaintiff. He, nevertheless, reported daily to the defendant, and also sought employment elsewhere. The defendant offered to employ him in making and selling fancy boxes. This he declined, but in fact earned fifteen dollars in other ways. The jury awarded him \$712 damages. Further facts appear in the opinion.

John D. Ahrens for appellant. Even if plaintiff were wrongfully discharged, he was bound to seek other employment; and if an offer of employment is made to him he is bound to accept it, so as to reduce his damages. (*Hamilton v. McPherson*, 28 N. Y. 72; *Shannon v. Comstock*, 21 Wend. 462; *Howard v. Daly*, 61 N. Y. 371.)

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George L. Simonson for respondent. The contents of a writing cannot be given in evidence in absence of proof of the loss of the paper and failure to notify the person in whose possession it was to produce the same. (Greenl, on Ev. § —; Stephens Dig. Law of Ev., art. 70, 71, p. 125.) An expert can only be examined as to facts. He could only be permitted to testify as to the nature, character and quality of the goods he had examined, and not as to his judgment of the ability of the person who prepared the goods. (*Holcombe v. Munson*, 5 Cent. R. 398.) Plaintiff was only obliged to seek employment of the same kind, and was under no obligation to accept terms offered by defendant. (*Costigan v. Mohawk R. R. Co.*, 2 Den. 609; *Shannon v. Comstock*, 21 Wend. 457; *Howard v. Daly*, 61 N. Y. 369.)

DANFORTH, J. The learned trial judge charged the jury that it was the plaintiff's duty to use reasonable diligence in procuring another place of the same kind in order to relieve the defendant as much as possible from the loss consequent upon his breach of contract, but that he was not bound to accept occupation of another kind. An exception to this qualification presents the only question raised upon this appeal, and it must be answered in favor of the plaintiff. He was ready during the entire year to perform his agreement, and could not be required to enter upon a new business or one different from that which he had undertaken. (*Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 609.)

It follows that the judgment is right and should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

GEORGE A. PORTER et al., Respondents, v. RICHARD PENN
SMITH et al., Appellants.

Under the new practice introduced by the provision of the Code of Civil Procedure (§ 992), forbidding exceptions to findings of fact in actions tried by the court or a referee, and permitting questions of fact to be reviewed by the General Term without exceptions, it is the duty of an appellant desiring a review of questions of fact to see that the case contains a certificate that all the evidence has been included, or all bearing on the questions so sought to be reviewed; in the absence of the certificate the General Term has a right to refuse to review such questions.

(Argued November 28, 1887; decided December 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 29, 1885, which affirmed a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 35 Hun, 118.)

This action was brought to recover an alleged over-payment by which defendants contracted to sell and plaintiffs to purchase 10,000 tons of coal. A disputed question of fact on the trial was as to the price agreed to be paid. The referee found, as a fact, that plaintiffs' claim was correct. The judgment of affirmance contains this statement: "The question of fact was not considered and passed upon for the reason that the case did not contain a statement that it contained all the evidence or all bearing upon the question of fact sought to be reviewed."

Louis Marshall for appellants. The judgment of affirmance indicates that the court refused to review the facts upon the ground of a want of power; this presents a question of law reviewable here. (*Tilton v. Beecher*, 59 N. Y. 176; *Russell v. Conn.*, 20 id. 81; *Tracey v. Altmeyer*, 46 id. 598; *Brown v. Brown*, 58 id. 609; *Allen v. Myer*, 73 id. 1; *Tolman v. S. B. & N. Y. R. Co.*, 92 id. 353-356.) The opinion being referred to in the order, can be considered in ascertaining the grounds of decision by the courts below. (*Tolman v. S. B. & N. Y. R. Co.*, *supra*; *Verplank v. Member*, 74 N. Y. 620.) If the right to review the facts existed in the General Term, notwith-

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standing the omission of the certificate, the defendants are entitled to a reversal and at least to have the case remanded to the General Term for a consideration of the questions of fact involved. (*Cox v. N. Y. C. & H. R. R. R. Co.*, 63 N. Y. 422.) Assuming that the certificate referred to was needed, the General Term had the right to review the facts, and to grant a new trial on the ground that the referee's findings and refusals to find were against the weight of evidence, or the proofs clearly preponderated in favor of a contrary result. (*Mead v. Smith*, 3 Civ. Pro. R. 171; 28 Hun, 639; Code, §§ 1337, 1338; *Baird v. Mayor, etc.*, 96 N. Y. 567; *Godfrey v. Moser*, 66 id. 250; *Starin v. Mayor, etc.*, 12 N. E. Repr. 643.) In order to confer upon the General Term the power to review the referee's findings of fact, it is not necessary that the case should contain a certificate, that it contains all the evidence given on the trial. (*Spence v. Chambers*, 39 Hun, 193; *Perkins v. Hall*, 56 N. Y. 91; *Johnson v. Witlock*, 13 id. 348; Rule 32, Supreme Ct.; *Howland v. Woodruff*, 60 N. Y. 73; *Jewell v. Steenburgh*, 58 id. 86; *Ryan v. Wavle*, 4 Hun, 804; *Lindsay v. People*, 63 N. Y. 150; *Dezell v. Row*, 1 T. & C. 4; *Beard v. Yates*, id. 21; *Perrin v. Hotchkiss*, 2 id. 370; *Parsons v. Coburn*, id. 324, 329; *Higby v. Heath*, 3 id. 783; *Magie v. Baker*, 14 N. Y. 438; *Hatch v. Fogarty*, 7 Robt. 488; *Field v. Lefler*, 50 Barb. 407; *Mayor, etc., v. Erben*, 10 Bosw. 189; *Dainese v. Allen*, 14 Abb. N. S. 366; *Clafin, v. Meyer*, 75 N. Y. 260, 267.) The referee erred in not giving legal effect to the accounts stated and settled between the parties and in permitting the same to be opened without proof of fraud or mistake. (*Lockwood v. Thorne*, 11 N. Y. 170; *Harley v. Bankes*, 76 id. 618; *Fullerton v. Dalton*, 49 id. 659.) The referee erred in admitting in evidence the indorsement as part of the contract. (*James v. Patten*, 6 N. Y. 9; *Passaic Mfg. Co. v. Hoffman*, 8 Daly, 495; *Scofield v. Hernandez*, 47 N. Y. 318.)

M. M. Waters, for respondents. The case made on this appeal having been made under the Code of Civil Procedure,

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section 997, as it contains only so much of the evidence as is necessary to present the questions intended to be raised and because it does not contain, or purport to contain, all the evidence the court will presume that the evidence was sufficient. (*Spence v. Chambers*, 39 Hun, 193.) An appeal to this court presents the same and only the same questions as were determined by the General Term. (Code Civ. Pro. §§ 13-37.)

FINCH, J. The General Term refused to review the questions of fact sought to be argued by the appellants, upon the ground that the case as made did not contain a statement that all the evidence given upon the trial was set forth within it; and the correctness of such ruling presents the sole question on this appeal. The necessity of the certificate has been asserted several times in the Supreme Court (*Spence v. Chambers*, 39 Hun, 193; *Howland v. Howland*, 20 Hun, 472), and has been justified upon the ground of the changed practice under the new Code, which forbids exceptions to findings of fact. (§ 992.) The theory upon which a case is prepared and settled has long been understood to be that the appellant should insert in it all the evidence bearing upon the questions intended to be raised, and the respondent add by amendment whatever he deemed necessary to a solution of those questions. An exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of error in the ruling excepted to, and puts upon him the responsibility of adding by amendment any needed proof. Thus on a motion for a nonsuit upon the ground that the evidence does not show a cause of action, an exception to the ruling warns the respondent that he must add any omitted fact essential in his judgment to sustain the ruling. And where, under the old Code, which permitted exceptions to findings of fact, such an exception was taken, it was notice of an intention to assail such finding as erroneous, and if any proof necessary to sustain it was omitted from the proposed case it became the duty of the respondent to supply it. We, therefore held that the General Term, on appeal, should

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assume that the case contained all the evidence bearing upon the questions sought to be raised. (*Perkins v. Hill*, 56 N. Y. 87.) But the situation is radically changed by the provision of the new Code, forbidding exceptions to findings of fact. Under that practice the respondent gets no warning or notice of an intention to review questions of fact, unless the case certifies that all the evidence has been included. If it so certifies the respondent must look to it that nothing which he deems essential is omitted, but if it does not so certify he is not in fault for supposing that questions of law only are intended to be reviewed, and omitting to load the case with needless proof. These views of the General Term seem to us sensible and well founded, and since they more immediately concern the duty of that court and the practice at its bar, they should have great weight with us. We have fully considered the suggestions to the contrary presented by the appellants, but they have not convinced us that a different rule should be established. Its tendency would be to compel respondents to require in every case the insertion of all the evidence as a measure of safety, and though, as the appellants suggest, that difficulty might be removed by some action of the trial court in settling the case, and in some way putting that action in the record, it would hardly be wise to reverse a rule already adopted, which adequately reaches the desired result. in order that some other rule, no more effective or convenient, should be substituted.

We therefore deem it our duty to approve of the practice adopted.

The judgment should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

Statement of case.

ELIZA DELAFIELD, Respondent, v. FRANCIS C. BARLOW, as
Executor, etc., et al., Appellants.

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107	535
144	568

S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the use of the testator's wife during her life; after her death the rents and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint." The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted "from the sum bequeathed to such daughter in this section." The will also empowered the executors "for the purpose of carrying into effect" the will and the trusts therein created, to sell "in their discretion" any and all of the real estate. In an action for partition of certain real estate of an interest in which the testator died, seized, and which was included in said residuary clause, *held*, that an infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (§ 1538); that she never could take the real estate, and had no title thereto or interest therein as realty, but that the whole title vested in the executors and trustees; that, construing all the provisions of the will together, the direction to sell the real estate was imperative and there was, therefore, an equitable conversion thereof into personalty.

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160	288

(Argued November 29, 1887; decided December 18, 1887.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 9, 1887, which affirmed an order of Special Term denying an application of Louisa Shaw Barlow to be made defendant herein.

This action was brought for the partition of certain real estate situated upon Staten Island. The material facts are as follows: Francis George Shaw died in 1882, at the time of his death owning an undivided two-fifths of the real estate. He left surviving him a wife and four daughters, one of whom is the wife of the appellant, Francis C. Barlow. He disposed of his estate real and personal by will in which after giving

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certain legacies and devising his homestead upon a special trust, he disposed of the residue of his estate as follows: "I direct my executors to divide one-half of all the residue of my estate, both real and personal, including the proceeds of all policies of insurance on my life not otherwise disposed of into four equal parts, and I give one of said equal fourth parts to my said executors, the survivors and survivor of them, in trust, nevertheless, to receive the rents, profit and income thereof as the same shall accrue, and to apply the same to the use of my said wife during her life, and, after her death, to apply said rents, profits and income to the sole and separate use of my daughter Anna, wife of George William Curtis, during her life, and after her death to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income, to the heirs of my said daughter Anna, or to such person or persons, or to such uses as my said daughter Anna may by her will appoint."

There were similar provisions as to each of the other fourths for the other daughters and their heirs. The other half of the residue he disposed of as follows: "Fifteenth. I direct my said executors to divide the other half of all the said residue of my estate into four equal parts, and I give and bequeath one of said equal fourth parts to my said daughter Anna; one other of said equal fourth parts to my said daughter Susanna; one other of said equal fourth parts to my said daughter Josephine, and the remaining equal fourth part to my said daughter Ellen. Any moneys paid and advanced by me to either of my said daughters, and charged in my books of account as advanced against her share in my estate shall be deducted without interest from the sum bequeathed to such daughter in this section; and if either of my said daughters shall have died before me, leaving issue, such issue shall have the parent's share, but if either of my said daughters shall have so died without issue, her share of said residue under this section shall go to my heirs or next of kin."

The seventeenth clause of his will is as follows:

"SEVENTEENTH. I hereby authorize and empower my said

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executors, the survivors and survivor of them for the purpose of carrying into effect this my will, and the trusts hereinbefore created, to sell, in their discretion, and on such terms as they may deem most advantageous any or all of my real estate at public or private sale, and to execute and deliver to the purchasers thereof all the necessary conveyances," etc.

He appointed his wife and his three sons-in-law, and his friend John Greenough, executors of his will and trustees of the trusts therein created. The executors and trustees were made defendants and it was alleged in the complaint that they were seized and possessed of two equal undivided fifth parts of the real estate sought to be divided. Francis C. Barlow was the only defendant who put in an answer. Upon the trial it appeared that at the time of the death of the testator Mr. and Mrs. Barlow had a daughter, Louisa Shaw Barlow, who was an infant, still living. Upon the trial, upon affidavits setting forth the facts, Barlow on his own behalf and on behalf of his wife and daughter, made a motion that his daughter be made a party defendant on the ground that she was a necessary party under section 1538 of the Code.

Charles W. Wetmore and *Francis C. Barlow* for appellants. The grandchildren of the testator were necessary parties to this action. (Code, §§ 1532, 1538; *Nellis v. Nellis*, 99 N. Y. 505, 516.) A power of appointment after or before a limitation to persons or classes of persons, does not divest the fee from such persons or put the fee in abeyance. (4 Kent [13th ed.] 205; *Cunningham v. Moody*, 1 Vesey, Sr. 174, 177; *Doe v. Martin*, 4 Term. R. 39, 45, 48, 64, 65, 67, 69, 70; *Doe v. Dowell*, 5 id. 518, 521; Williams on R. Prop. [6th ed.] 293; Cornish on Remainders [ed. 1827] 100; Sugden on Powers [3 Am. from 7th Eng. ed] 5; *Mead v. Mitchell*, 17 N. Y. 210, 211, 213; *Lockman v. Reilly*, 95 id. 70, 71.) The trustees did not sufficiently represent the grandchildren in the action. (*Mead v. Mitchell*, 17 N. Y. 210, 211, 214, 215; 5 Abb. 92; *Gifford v. Hord*, 1 Sch. & Lef. 409; *Bodine v. Greenfield*, 7 Paige, 544, 548; *Ridgeley v. Johnson*, 11 Barb.

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527, 535; *Brennan v. Wilson*, 71 N. Y. 507; *Wilder v. Ramsey*, 95 id. 7, 12; *Hobart v. Bellis*, 86 id. 636, 637.) Courts of their own motion look after the rights and interests of infants and protect them without either application or appeal by them. (*Braker v. Devereaux*, 8 Paige, 514.)

Sidney F. Rawson for respondent. No appeal can be taken from an order by a person not a party to the action, nor can an appeal be taken, as is here attempted, by a party in behalf of a person not a party. (Code, § 1294; *People v. Lynch*, 54 N. Y. 681; *Hobart v. Hobart*, 86 id. 636.) There is no ground for an appeal by defendant Barlow upon the record, and he is estopped as a party. (*Robert v. Corning*, 89 N. Y. 225; *Morse v. Morse*, 85 id. 53; Code, § 522; *Prentice v. Janssen*, 79 N. Y. 478; *Dunham v. Cudliffe*, 94 id. 129.) If there is a defect of parties, it not having been pleaded, is waived. (*Rockwell v. Decker* 33 Hun, 343.) The language of the will as to the residue involved a conversion. (*Asche v. Asche*, 18 Abb. [N. C.] 83.) The will converted the land into personal estate as between those entitled thereto. (*Hetzel v. Barber*, 69 N. Y. 1; *Prentice v. Janssen*, 79 id. 478; *Mott v. Ackerman*, 92 id. 540; *Rockwell v. Decker*, 33 Hun, 343; *Gallio v. Eagle*, 65 Barb. 585; *Bailey v. Bailey*, 28 Hun, 603; *Farrar v. Mc Cue*, 89 N. Y. 139; *Delaney v. McCormack*, 88 id. 174; *Crook v. Kings Co.*, 97 id. 421, 446, 447; *Bennett v. Garlock*, 79 id. 302.) There is here a valid trust during Mrs. Shaw's life, and for the life of Mrs. Barlow. Mrs. Barlow's children therefore take no present estate in the land. (*Delafield v. Shipman*, 103 N. Y. 463.)

EARL, J. We are of opinion that the motion was properly denied on the ground that Louisa Shaw Barlow was not a necessary or proper party to this action. It is undisputed that valid trusts were created as to the one-half of the residue of the testator's real and personal estate, which he gave to his executors and trustees; and that during the continuation of

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the trusts, to wit, during the lives of the testator's widow and of the several daughters, the title to the several quarters of real estate involved in the trusts was vested in the trustees. But the claim is made by Mr. Barlow that after the death of his wife his daughter might become entitled to the one-quarter of the real estate, and that therefore she should have been made a party.

We are of opinion that she never could take the real estate and that she had no title thereto or interest therein as realty, and that the whole title was vested in the executors and trustees. Construing all the provisions of the will together we think there was an imperative direction to sell the real estate, and there was therefore an equitable conversion thereof into personalty, and as to the rights of Louisa Shaw Barlow the property is to be treated as personal property.

The residue of the testator's estate both real and personal is mingled together and one-half thereof is given to his executors upon the trusts mentioned. The trustees are directed to receive "the rents, profits and income thereof," which implies that they were expected to hold the real estate as well as the personal for a time until in the exercise of their discretion they could convert the same, and during that time they were to lease the real estate and receive the rents thereof. But after the death of each daughter the direction is that they should "pay over, transfer and deliver the principal of said one-fourth part together with any arrears of income to the heirs" of the daughter or to "such person or persons or to such uses" as the daughter might by her will appoint. This language shows that the testator contemplated that at the death of each daughter the one-fourth part put in trust for her benefit during her life should exist in the form of personal estate. The language used "to pay over, transfer and deliver the principal" is not appropriate if applied to real estate, and is only appropriate as applicable to personal estate. The principal together with any arrears of income was to be paid over, and it was supposed that the principal and income would both be of the same species of property, both personal.

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The fifteenth clause shows that it was intended by the testator that the property given to his daughters should pass to them in the form of personal estate. He says, "I give and bequeath," language strictly more applicable to personal than to real estate. Then the money paid in advance by him to either of his daughters and charged in his books of account as advanced, was directed to be deducted without interest from the "sum bequeathed," and if it was real estate which the testator had in mind he would not have spoken of it as the "sum bequeathed." While the language contained in the seventeenth clause giving the power of sale is not, standing alone, imperative, yet when read in connection with the other clauses of the will, it should be so construed, and the discretion conferred upon the executors should be held to be a discretion only in reference to the time, mode of sale and the terms of sale. The sale was to be made for the purpose of carrying into effect all the provisions of the will, that is, for the purpose of making a division of the one-half among his daughters and for the purpose of the trusts, as to the other half, for the benefit of his wife and daughters and their heirs or appointees.

We, therefore, reach the conclusion, not without some hesitation and doubt, that by the terms of this will there was an equitable conversion of the real estate mentioned into personalty and that, therefore, Louisa Shaw Barlow was not a necessary or proper party defendant in this action. While precedents are not very valuable in a case like this where the decision must be based upon the peculiar phraseology of the entire will, the case of *Morse v. Morse* (85 N. Y. 53), bears a strong analogy to this and may be cited as an authority for our conclusion.

The order should be affirmed, with costs.

All concur.

Order affirmed.

Statement of case.

THE PEOPLE ex rel. THE KNICKERBOCKER FIRE INSURANCE
COMPANY, Appellant, v. MICHAEL COLEMAN et al., as Com-
missioners of Taxes and Assessments, Respondents.

Under the provision of the act of 1857 (§ 8, chap. 456, Laws of 1857), in reference to the taxation of the capital stock of certain corporations, which provides that such stock, after certain specified deductions, "shall be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county," the method of ascertaining the actual value is left to the judgment of the assessors, and they have a right to resort to any and all of the tests and measures of value which were ordinarily adopted for business purposes in estimating values.

When the assessors have so exercised their judgment it is subject to no review or correction, except as prescribed by law.

Accordingly, *held*, that in making such an assessment, the assessors were not limited to the market value of said stock less the statutory exceptions, and where they took as the measure of value the "book value," i. e., estimating all the assets as they appeared on the corporate books, deducting all the liabilities and other matters required to be deducted by law, that their action, if it did injustice to the corporation, was subject to review in the Supreme Court under the act of 1880 (Chap. 269, Laws of 1880); but that this court had no power to interfere with the assessment.

(Argued November 29, 1887; decided December 13, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 7, 1887, which affirmed the proceedings of defendants, the Commissioners of Taxes and Assessments of the city of New York, in assessing the capital stock of plaintiff, which proceedings were brought up for review on *certiorari*.

It appeared that the relator's stock, at par, amounted to \$210,000; the market-price of the shares was ninety cents. For the purpose of determining the actual value, the assessors valued the gross assets appearing on the company's books at \$374,872; deducted therefrom the liabilities, \$67,125, leaving the net value, \$307,747; from this they deducted the assessed value of the company's real estate, United States stock and ten per cent on the capital, amounting, in all to \$282,840, leaving a balance of \$24,917, for which amount the relator was assessed.

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107	541
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Esek Cowen for appellant. The assessment should not exceed the market value of the capital stock, less statutory exemptions. (2 R. S. 992, pt. 1, chap. 13, tit. 2, art. 2, § 17, Laws of 1857, chap. 456, § 3; *Starch Co. v. Dolloway*, 21 N. Y. 458; *McMahon v. Palmer*, 102 id. 186; *People v. Com'rs, etc.*, 95 id. 554, 557, 561; *People ex rel v. Asten*, 100 id. 597; *People, etc., v. Com'rs Taxes*, 31 Hun 32; *R. W. & O. R. R. Co. v. Smith*, 39 id. 332.)

Geo. S. Coleman, for respondent. The method of assessment adopted by the commissioners was in strict conformity with law. (Laws of 1857, chap. 456, § 3; *People v. Asten*, 100 N. Y. 597-602.) The respondents in placing an estimate on the capital and surplus of the relator, were engaged in the performance of a judicial duty, and it was incumbent on the relator to show affirmatively and beyond question, that the judgment of the commissioners was unwarranted. (*People v. Asten*, 100 N. Y. 600; *People ex rel. Bk. v. Com'rs*, 67 id. 521; *People ex rel. W. Ins. Co. v. Davenport*, 91 id. 584.) The market value of shares of stock of the corporation is not the proper and sole test of the value of the corporate capital. (*Albany Co. Nat. Bk. v. Maher*, 19 Blatch. 175, 178; *Van Allen v. Assessors*, 3 Wall 573, 583, 584.) In view of the fact that the commissioners accepted the relator's own figures in fixing the valuation of capital, it cannot be claimed that the valuation was excessive or unwarranted. (*People v. Asten*, 100 N. Y. 600.) All the deductions from the valuation of capital authorized by law, were allowed by the commissioners. (*People ex rel. v. Davenport*, 91 N. Y. 574, 582, 583; R. S. [7th ed.], 981, § 1; id., 982, § 3; Laws of 1883, chap. 392, § 1; 104 N. Y. 243.)

EARL, J. The relator claims that its capital stock was illegally and improperly assessed, and it instituted this proceeding for the purpose of correcting the assessment. The law regulating the assessment of the capital stock of such a corporation is found in section 3 of chapter 456 of the Laws of 1857, which is as follows:

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“The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county.”

This section has been under consideration in this court several times, and its true construction and practical application have been found not to be entirely free from difficulty. (*Oswego Starch Factory v. Dolloway*, 21 N. Y. 458; *People v. Com. of Taxes*, 95 id. 454; *People v. Asten*, 100 id. 597.) The law does not prescribe how the actual value of the capital stock of a corporation is to be ascertained. That is left to the judgment of the assessors, and in appraising the actual value they have a right to resort to all the tests and measures of value which men ordinarily adopt for business purposes in estimating and measuring values of property. They may take into account the business of the corporation, its property, the value of its actual assets, the amount and nature of its present and contingent liabilities, the amount of its dividends and the market value of its shares of stock in the hands of individuals. They may resort to any or all of these as to them seems best, and they are not confined to one of them. They may take that test which they think will be most likely to give them the actual value of the stock, and they may disregard all the others. They are not bound to seek for all the evidence which bears upon value; that would be impracticable. The law commits the matter to their judgment and when they have exercised that, it is subject to no review or correction except as prescribed by law.

One mode of arriving at the actual value of the capital stock of a corporation is to take what is sometimes called the book value, which is reached by estimating all the assets as they appear upon the corporate books, and deducting all the liabili-

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ties and other matters required to be deducted by law, and taking the balance as the measure of value for assessment. This seems to be a proper method for arriving at the value of the capital stock in the case of a corporation which is about to discontinue business, wind up its affairs and distribute its assets among its shareholders. But it cannot always, or usually, be a fair or correct method of assessment in the case of a going corporation whose assets are to remain at the risk of its business. In the case of an insurance company, the actual value of its capital stock must usually be less than the book value, and the same must frequently be true of other corporations which are engaged in business attended with many hazards and fluctuations. In the case of a corporation the value of whose capital stock is largely made up of its franchise, good will and business advantages, the book value of its capital stock will be less than the actual value. Hence it would not be just for assessors always, or even generally, to take the book value of the capital stock of going corporations as the measure of value for the purpose of assessment.

So the market value of the shares of capital stock may sometimes be above and sometimes below the actual value. Such value may be greatly enhanced or depressed for speculative purposes without any change in the actual value. But the market value of any stock which is listed at the stock exchange in New York, and largely dealt in from day to day for a series of months will usually furnish the best measure of value for all purposes. The competition of sellers and buyers, most of them careful and vigilant to take account of everything affecting value of stock in which they deal, and each mindful of his own interests, and seeking for some personal gain and advantage, will almost universally, if time sufficient be taken, furnish the true measure of the actual value of stock. But there is no law which compels assessors to resort to market value to find the actual value of capital stock. That standard is sometimes illusory and untrustworthy. The buyers or sellers may be too few and the transactions not sufficiently numerous to furnish a real test of value.

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Here the commissioners of assessment appear to have taken, as the measure of the actual value of this stock, the book value, and they disregarded the market value. By doing this they may have done, and probably did do, injustice to the corporation. That injustice was subject to review in the Supreme Court under chapter 269 of the Laws of 1880. That court had the power to correct any assessment if it found it to be "illegal, erroneous or unequal," and it could supervise the judgment of the commissioners. This court exercises no such power, and even if we should think the commissioners erred in their judgment, as to the actual value of the capital stock, by taking one test of value when another would in our opinion have been better, no absolute rule of law being violated, we would still have no power to interfere with the assessment. (*People v. Hicks*, 105 N. Y. 198.) If they had taken a standard of value which was not in fact any measure of value, the case would have been different.

It follows from these views that the judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed.

DAVID L. REED, Respondent, v. ALFARETTA REED et al.,
ABRAHAM BERNHEIMER, Purchaser, Appellant.

Where an action for partition is commenced by one who is, under the Code of Civil Procedure (§ 1538), a proper party to the action, but is not "a joint tenant or tenant in common" and so, not entitled to be plaintiff, the defect is not jurisdictional, and a decree directing a sale, if erroneous, is not absolutely void; where, therefore, no appeal is taken, the judgment is conclusive upon the parties.

Accordingly, *held*, that the defect was no objection to the title offered a purchaser on such a sale, and that his motion to be relieved from the sale was properly denied.

(Submitted November 29, 1887; decided December 13, 1887.)

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APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 5, 1887, which affirmed two orders of Special Term, one denying a motion on behalf of Abraham Bernheimer, a purchaser at a sale under the judgment herein to be relieved from his purchase; the other granting a motion on the part of plaintiff, that said purchaser be required to complete his purchase.

This action was brought to procure the sale or partition of certain premises in the city of New York, and a division or distribution of the proceeds among the parties to the action, as their interest might appear. A sale was ordered and Bernheimer became purchaser at the price of \$10,125. In compliance with the conditions of the sale he paid to the referee ten per cent on the amount bid by him, viz., \$1,012.50, and agreed to pay the residue on June 11, 1887. At that time, however, he refused to pay the balance of his bid, alleging that the title was defective for the following, among other reasons: *First*. That the plaintiff had no such interest in the real estate as would entitle him to maintain the action. *Second*. That he was "prohibited by the provisions of section 1538 of the Code of Civil Procedure from being a plaintiff in the action;" that some of the defendants "at the time of bringing the action were infants, and the judgment and sale not binding upon them." He claimed that for these and other reasons not important, the title to the premises was a doubtful and unmarketable one. The sale was reported to the court and duly confirmed.

Edward D. Bettens for appellant. The case should be very plain which would authorize a court on a motion to compel a party to take a conveyance, and then it should be determined only with the consent of such purchaser. (*Jordan v. Poillon*, 77 N. Y. 518, 521, 553.) As a rule a title which is open to a judicial doubt is not a marketable title. (*Shriver v. Shriver*, 86 N. Y. 575, 584.)

John J. Sullivan and *Abraham Stern* for respondents. The plaintiff had such interest in the real estate as would entitle

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him to maintain this action. (*Cromwell v. Hull*, 97 N. Y. 209; *Tilton v. Vail*, 42 Hun, 638; *Riker v. Hyer*, 1 Paige, 486; Freeman on Co-tenancy and Partition, §§ 455, 456; *Mussey v. Sanborn*, 15 Mass. 155.) Notwithstanding the fact that the plaintiff under section 1538 of the Code of Civil Procedure was prohibited from being a plaintiff in this action, all the parties having any interest in the premises being parties to the action, and having been personally served with process, there having been a judgment and the court having confirmed the sales made thereunder, the judgment is binding and conclusive upon all the parties to the action, and gives the purchaser a valid title. (*Cromwell v. Hull*, 97 N. Y. 209.) The appellant is not in a position to attack the judgment as it now stands if it is erroneous. The only persons who could complain are the parties to the action, and they not having done so, the purchaser is protected and his title is good. (*Woodhull v. Little*, 102 N. Y. 165; *Blakely v. Calder*, 15 id. 617; *Abbot v. Curran*, 98 id. 665; Code of Civil Pro., §§ 1557, 1577.) As no one but the parties to the action can call in question the purchaser's title, and as they are bound by the judgment the court having jurisdiction there is no reason why the sale should not be consummated. (*Blakely v. Calder*, 15 N. Y. 617; *Howell v. Hills*, 56 id. 226; *Sullivan v. Sullivan*, 66 id. 37.)

DANFORTH, J. It appears by the report of the referee that the plaintiff's interest in the premises was that of tenant by the curtesy, and as such he was entitled to the possession and profits of the lands and premises described in the complaint, during his natural life; that the defendant, Alfaretta Reed, was seized in fee simple, subject to the plaintiff's estate, of one equal undivided one-half part of those premises; that the other defendants were infants under the age of twenty-one years and were seized in fee simple, subject to the same rights, each of one equal undivided one-sixth part of the premises. The principal contention of the appellant is placed upon the provisions of section 1538 of the Code of Civil Procedure,

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which, after naming the necessary parties to an action for partition, declares that "no person other than a joint tenant or tenant in common of the property, shall be a plaintiff in the action." The same section provides that every person having an undivided share in possession or otherwise in the property in question, as, among others, "a tenant by the curtesy," must be made a party to such an action. It is plain, therefore, the objection is simply that he stands upon the record as plaintiff, and not as defendant.

The judge at Special Term put the decision upon the case of *Cromwell v. Hull* (97 N. Y. 209) decided in October, 1884. In that case the same fact appeared and this court held that if a plaintiff in a partition suit was not authorized to maintain the action because not a joint tenant or tenant in common with the remainderman, still the defect was not jurisdictional, and the decree, if erroneous, not absolutely void. That determination applies to and covers this case unless the appellant is right in his contention that a different rule now prevails. The partition suit in the case cited was before the Code. That, however, can make no difference. The court in the present instance had jurisdiction of the parties and of the subject-matter of the action, and from the decision made, no appeal was taken. All the parties, therefore, are bound. The judgment in *Cromwell v. Hull* (*supra*) covers the case and it is unnecessary to add to the discussion. We think the title offered to the purchaser was a good title and his motion to be relieved was properly denied.

The order appealed from should, therefore, be affirmed.

All concur.

Order affirmed.

Statement of case.

MARY A. A. LIVINGSTON, Appellant, v. CLARA O. L. TUCKER et al., Respondents.

The will of L. gave a life estate in two-twentieths of his property to his widow, the remainder over to his infant daughter M., in case she survived her mother; if not, then to certain other beneficiaries in the order named. In an action for partition of certain real estate of which said testator died seized, commenced during the minority of A., and wherein she was made a party defendant, the judgment directed a sale of the premises. The testator's widow was given the liberty to accept, and did accept, out of the proceeds of sale, a gross sum in lieu of her interest as tenant for life, and the balance of the purchase-money of the two-twentieths was directed to be paid into court, to be invested by the chamberlain of the city of New York, and, upon the death of the life tenant, the fund, "with all accumulations of interest, dividends or income," to be paid to M., if then living; if not, then to the beneficiaries entitled under the will to take. Upon coming of age M. petitioned that the accumulation be paid over to her on the ground that such accumulation was prohibited by statute (1 R. S. 726, §§ 37, 38), and that she was entitled thereto "as presumptive owner of the next eventual estate." *Held*, that the matter of the disposition of the fund was directly involved in the action and was *res adjudicata*; and, therefore, that the petition was properly denied.

It seems that the directions for accumulation were proper, as the will did not contain any directions authorizing it, and as the income was paid off in advance out of the principal, when subsequently received, it was properly devoted to restoring said principal to the condition it would have been if it had not been thus depleted.

(Argued November 29, 1887; decided December 18, 1887.)

APPEAL, by Mary A. A. Livingston, from order of the General Term of the Supreme Court in the first judicial department, made October 26, 1887, which affirmed an order of Special Term denying the petition of the appellant, praying that an order be made directing the payment to the petitioner of the accumulation of interest, dividends and income of the two funds mentioned in her petition.

The nature of the two funds and how arising is set forth in the opinion.

Geo. S. Wilkes for appellant. The orders of court mentioned in the petition directing accumulation during the life of

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Evalina M. Livingston and Bliss are void. (*Harris v. Clark*, 7 N. Y. 242; *Pray v. Hegeman*, 92 id. 508; 86 id. 227; 29 Hun, 20; 1 R. S. 726, §§ 37, 38, 40.)

Paul F. C. Tucker for respondents. The respondents have a valid contingent remainder in fee in the principal and income. (1 R. S. 726, §§ 4, 26 of art. 2, chap. 1, pt. 2.)

FINCH, J. The petitioner is a devisee under the will of Robert Swift Livingston who died in 1867. No copy of that will is furnished to us, and we only know its contents from some brief and partial statements contained in the petition. The testator gave to his wife Matilda a life estate in two twentieths of his property, and the remainder over to the petitioner, who alleges that such remainder was in fee, but does not explain whether such fee was absolute, conditional, or contingent. Subsequently, and during the minority of the petitioner, an action of partition was brought in which she among others was made a party defendant. By the decree entered the testator's widow was at liberty to accept out of the proceeds of the sale ordered, a gross sum in lieu of her interest as tenant for life, and did so accept it. The balance of purchase money was required to be paid into court to be invested by the chamberlain of the city New York, as follows: First, for the benefit of the infant defendant, Mary Alice, who is the present petitioner; second, in case she should die before her mother who was the life tenant, "then for the benefit of those entitled thereto by the seventh clause of the last will and testament of Robert Swift Livingston, deceased." That clause is not furnished for our examination. We can only infer its contents from the further provisions of the decree directing the ultimate distribution. Those provisions are that upon the death of the life tenant the fund "with all accumulations of interest, dividends or income," be paid, first, to Mary Alice if she should be then living; second, if she should be then dead leaving issue then surviving, such issue should take the whole, share and share alike; but, third, if at the death of the life tenant, Mary Alice should be dead leaving no issue at that date

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surviving, then the fund to be paid in specified proportions to nine ultimate remaindermen if then living and to the issue then living of such as should be dead. We must assume this distribution to have followed the terms of the will, and, so far at least, to have determined its construction.

Another portion of the testator's lands was also sold under a judgment of the court, proceeding upon the authority of a special act of the legislature permitting such sale. Out of the proceeds the life tenant again took a gross sum in discharge of her interest, and the order of the court appointed the United States Trust Company trustee to receive and hold the remainder of the proceeds "during the lifetime of the said Evalina," the life tenant, "and during that period to allow the same to accumulate, and hold the said trust property for the use of the same persons and subject to the same limitations as provided by the will of the aforesaid Robert Swift Livingston, deceased." The fund in the hands of the trustee has been transferred by the order of the court to the city chamberlain. Mary Alice has become of full age, but her mother, the life tenant, is still living. On these facts the petitioner alleges that the two orders for accumulation are void, and claims to be entitled to receive the accumulations as well as the two funds themselves "as presumptive owner of the next eventual estate." Her petition has been denied and the denial affirmed.

There are two answers to the appellant's demand independent of that given by the Special Term. The disposition of the funds is *res adjudicata*. It was directly involved in both actions, and we must assume was determined in accurate accordance with the provisions of the will. No new fact has occurred to change the situation or confer new and different rights. That the petitioner has arrived at full age is an immaterial circumstance. The period of distribution is fixed at the death of the life tenant and not at the majority of the petitioner. The decree, therefore, cannot be attacked and in effect reversed upon this motion, when the jurisdiction of the court is not assailed and there is no allegation of fraud. The counsel for the appellant says he does not assail it. He says in his

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brief "we do not seek to set aside or disturb the judgment. We only ask for the accumulations of interest, etc., undisposed of by the judgment the directions as to which are *void* and therefore should be stricken from the judgment." Those directions may have been erroneous, but they are not void. The court had complete jurisdiction both of the parties and of the subject-matter, and, if it withheld from the petitioner what should have been awarded to her and proceeded upon an erroneous view of the will and the rights of the parties under it; that should have been corrected on appeal and does not make the judgment void.

But there is another answer. The directions to accumulate are not necessarily even erroneous, and the authorities cited do not apply. (1 R. S. 726, §§ 37, 38; *Pray v. Hegeman*, 92 N. Y. 508.) The statute avoids directions to accumulate made by deed or will, except as specified. It does not appear that the will of Livingston contained any such directions. The inference, from what appears, is that it did not, and so the statute was not violated. But, I think, what are now called accumulations are not really such. The testator contemplated that the annual income of the two-twentieths should be paid year by year to his widow, the life tenant. On his plan there could be no accumulations at all. What happened came from the intervention of the court ordering a sale and the acceptance by the widow of a gross sum in lieu of her annuity. The fund paid off the income in advance and out of principal. Its income since then has been merely paying back to the principal those advances and restoring it to the condition it would have been in if it had not been depleted. At the death of the widow it will simply be, in theory at least, fully restored, and the original devise over capable of being accomplished as intended. But without deciding this point finally, it is enough that the direction of the court is not void, even if erroneous.

The order should be affirmed, with costs.

All concur.

Order affirmed.

Statement of case.

WILLIAM V. CLARK, Appellant, v. THE BOARD OF SUPERVISORS OF SARATOGA COUNTY, Respondent.

In November, 1866, the board of supervisors of Saratoga county, acting under the authority conferred upon such board by the acts of 1864 and 1865 (Chaps. 8 and 72, Laws of 1864, chap. 41, Laws of 1865), passed resolutions providing for raising, by taxation, a portion of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." Similar resolutions were passed each year down to 1875, and the annual accounts of the county treasurer with the accompanying vouchers showed that he made new loans and issued new obligations each year. In an action upon two notes given by the county treasurer to plaintiff for money loaned which, upon their face, purported to have been issued in pursuance of said resolutions, it appeared that said officer had fraudulently overissued notes to a large amount, and that plaintiff was, with the exception of one year, a member of the board of supervisors from 1868 to 1875, and chairman of the board for several years. There was no proof that at the time the money was borrowed it was not needed for the purposes specified in the resolutions, or that it was misappropriated. *Held*, the presumption was that the county treasurer actually borrowed this money, as authorized, and applied it to the uses of the county, that the fact that plaintiff was a member of the board did not make him chargeable with knowledge of the wrongs perpetrated by the county treasurer; but even if so chargeable, this would not constitute a defense.

(Argued December 2, 1887; decided December 18, 1887.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 12, 1885, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial without a jury.

This action was brought upon two notes issued to plaintiff by Henry A. Mann, then treasurer of the county of Saratoga, of one of which notes the following is a copy :

"No. 67. SARATOGA COUNTY TREASURER'S OFFICE, }
BALLSTON SPA, April 23, 1875. }

"In pursuance of a resolution passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay at the Saratoga county treasurer's

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office, on the 15th day of February, 1876, W. V. Clark or bearer seven hundred dollars, at 7 per cent interest for value received.

"\$700.

"HENRY A. MANN, *Treasurer*."

The other note was similar in form, save that it was dated August 5, 1875, and was for the sum of \$800.

Both notes were given for moneys advanced by plaintiff and ostensibly borrowed by Mann in pursuance of the resolution referred to therein. That resolution authorized the county treasurer to borrow on the credit of the county \$8,000 for one year.

It appeared, among other things, that in November, 1865, the county of Saratoga was indebted to the amount of \$618,000 for bounty moneys borrowed on its credit. This debt was represented by obligations signed by Mann as county treasurer, some in the form of notes similar to those in suit, others in the form of bonds. At the annual meeting of the board of that year, resolutions were passed directing the county treasurer to procure an extension of certain portions of said debt. At each subsequent annual meeting down to and including 1874, said board passed similar resolutions, the plan being to pay part of the debt each year, and to extend the remainder. The county treasurer assumed to exercise the authority so given to extend the debt under these annual resolutions by borrowing money to pay maturing obligations, and giving notes therefor, or by giving new obligations to take up the old ones. If the treasurer had actually applied the moneys raised by taxation each year for the payment of said indebtedness to that purpose, the amount unpaid in February, 1875, would have been about \$8,000. He, however, misappropriated large amounts thereof and actually borrowed that year \$138,631.

The further material facts are stated in the opinion.

L. B. Pike for appellant. The power to renew or continue the indebtedness was complete. (*Laws of 1864*, chap. 8, § 15; *Potter's Dwaris*, 123 *Max.* 7, 8; *Williamsport v. Comm.* 84 *Penn. St.* 487; *Mayor, etc., v. Inman*, 57 *Ga.* 370;

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People v. Brennan, 39 Barb. 523, 545; *Ketchum v. Buffalo*, 21 id. 294; 14 N. Y. 356, 365; *Meech v. Buffalo*, 29 id. 198; *Tucker v. Raleigh*, 75 N. C. 267; *Hall v. Lauderdale*, 46 N. Y. 70; *Le Couteux v. Buffalo*, 33 id. 333; R. S., pt. 1, chap. 12, tit. 1, art. 1, § 2.) The authority given the agent, the county treasurer, to extend, carried with it the power to do the acts necessary to the attainment of the purpose. (*Hall v. Lauderdale*, 46 N. Y. 73; Story on Agency, § 97; *Com. Bank v. Norton*, 1 Hill, 504; *Williams v. Getty*, 31 Penn. St. 464; *Sup'rs v. Seabury*, 11 Abb. [N. C.] 461, 671; *Jagger I. Co. v. Walker*, 76 N. Y. 521; *Belmont v. Coleman*, 1 Bosw. 188; *Nelson v. Eaton*, 26 N. Y. 414, 415; *Farmers L. & T. Co. v. Curtis*, 7 id. 466; *De Groff v. Am. Linen T. Co.* 21 id. 124; *Farmers L. & T. Co. v. Clowes*, 3 id. 470; *Partridge v. Badger*, 25 Barb. 146; *Lee v. Sandy Hill*, 40 N. Y. 442; *N. Y. & B. S. M. & L. Co. v. Brooklyn*, 71 id. 584; *Jackson v. Marsh*, 6 Cow. 281; *People v. Sup'rs*, 34 N. Y. 516; *Magee v. Cutler*, 43 Barb. 253.) The power to borrow and extend being in the county, an irregular exercise of that power cannot defeat plaintiff. (*Moore v. Mayor, etc.*, 73 N. Y. 239; *People v. Sup'rs*, 43 Barb. 398; 34 N. Y. 516; *Magee v. Cutler*, 4 Barb. 240; *Faulkner v. Metcalf*, id. 258; *People v. Sup'rs*, 43 N. Y. 130; The county obligations were valid in whatever form they were given for this debt. (*People v. Sup'rs*, 34 N. Y. 522; 6 Week. Dig. 370; *People v. Mead*, 24 N. Y. 114; *Kelly v. McCormick*, 28 id. 318, 323; *Mott v. Hicks*, 1 Cow. 513; *Phelps v. Yates*, 16 Blatch. 192; 68 Me. 160; 6 Otto, 312; *Solon v. Bk.*, 35 Hun, 1; *Gervois v. Sitterly*, 56 N. Y. 214; *Oneida Bk. v. Ontario Bk.*, 21 id. 490; *People v. Brennan*, 39 Barb. 544; *Moss v. Averill*, 10 N. Y. 457; *Kelly v. Mayor, etc.*, 4 Hill, 263; *Williamsport v. Comm.*, 84 Penn. St. 487; *Ketchum v. Buffalo*, 14 N. Y. 375; *Moss v. Oakley*, 2 Hill, 265.) If an original authority were wanting the subsequent ratification by the supervisors was equivalent to an original authority. A municipal corporation can ratify an act it could originally authorize. (*Shawneetown v. Baker*, 85 Ill. 564;

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Peterson v. Mayor, etc., 17 N.Y. 453; *People v. Flagg*, id. 586; *Brady v. Mayor, etc.*, 1 Barb. 584; Story on Agency, §§ 244, 254, 255; *Hoyt v. Thompson*, 19 N. Y. 208; *Sup'rs v. Seabury*, 11 Abb. [N. C.] 461; *Brown v. Mayor, etc.*, 63 N. Y. 244; *People v. Sup'rs*, 68 id. 119.) The county having permitted its treasurer to transact its business in this manner, and having approved his acts, authorized him to continue in the same manner, and justified parties in dealing with him in that manner. (Story on Agency, §§ 89, 260; *Calhoun v. D. R. R. Co.*, 28 Hun, 379, 402.) A party dealing with a municipal corporation must see to it that the power exists, and there his duty ends. (*Belo v. Com'rs*, 76 N. C. R. 489; 7 Otto, 272; *Orleans v. Platt*, 9 id. 682; *Com'rs v. Bolles*, 94 U. S. 104; *Dodge v. Platte Co.*, 82 N. Y. 230.) The treasurer's misappropriation is chargeable to the county, and the county must raise the money again in some manner. (*Chemung Co. Bk. v. Sup'rs*, 5 Denio, 522, 523; *Bassett v. Ohio*, 26 O. R. 543; *People v. Comptroller*, 77 N. Y. 45; *Federgreen v. Fallsburgh*, 25 Hun, 152; *Ketchum v. Buffalo*, 14 N. Y. 363-366; 87 id. 628; 98 Ill. 94.) The giving of the new obligations, if they were void, did not extinguish the debt. (43 N. Y. 159; 65 Barb. 303; 27 How. 111; 58 N. Y. 350; 46 id. 76; 5 Denio, 517; 13 Wend. 101; 11 id. 9; 15 Johns. 475; *Jagger Iron Co. v. Walker*, 76 N. Y. 521.) The notes in question, if they were void as obligations, were still valid to extend the debt, so far as to prevent the statute of limitations running under section 395, Code of Civil Procedure, and in any view of the case would so operate. (*In re Consalus*, 95 N. Y. 340; *Nat B'k v. Phelps*, 86 id. 484; *Smith v. Ryan*, 66 id. 352; *Kelly v. Weber*, 27 Hun, 8; *Harper v. Fairley*, 53 N. Y. 442; *Shoemaker v. Benedict*, 11 id. 185; *People v. Ingersoll*, 58 id. 1; *Huff v. Knapp*, 5 id. 66, 67; *People v. Stout*, 23 Barb. 346; *People v. New York*, 5 Cow., 336.) The obligations in suit are such as need not have been presented to the board of supervisors of the county to be audited by them. (1 R. S. [Banks 6th ed.], 929, § 10; *Blake v. Sup'rs*, 61 Barb. 149; *Chemung Co. B'k v. Sup'rs* 5 Den. 517;

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Backer v. Sup'rs, 3 W. Dig. 293; *Marsh v. Little Valley*, 1 Hun, 554; 64 N. Y. 112; *People v. Hawkins*, 46 id. 9; *Newman v. Sup'rs*, 45 id. 686; *Bridges v. Sup'rs*, 92 id. 570; *Hathaway v. Homer*, 5 Lans. 267; *Federgreen v. Fallsburg*, 25 Hun 152; *Hill v. Sup'rs*, 12 N. Y. 52; *People v. Thompson*, 25 Barb. 73; *Brown v. Canton*, 4 Lans. 409; 64 N. Y. 112; 46 id. 9; 61 Barb. 149; 2 Hill 45; 92 N. Y. 580.) The bonds, notes and instruments being within the power of the county, even if improperly issued by the treasurer were negotiable instruments, and in the hands of a *bona fide* transferee for value, are binding on the county. (*B'k Rome v. Rome*, 19 N. Y. 20; *Brainard v. N. Y. C. & H. R. R. Co.*, 25 id. 495, 500; *Lindsley v. Diefendorf*, 43 How. 357; *People v. Mead*, 24 N. Y. 114; *Delafeld v. Ill.* 2 Hill 159; *Blake v. Sup'rs*, 61 Barb. 159; *Bissell v. M. S. R. R. Co.*, 22 N. Y. 290; 84 Penn. St. 487; 24 Am. Rep. 208; 13 Blatch. 246, 424; 12 id. 539; 12 Wheat. 70; 11 Otto. 494; 1 Wall. 83, 175, 384; 5 id. 784; 15 id. 358; 14 id. 252; 19 Alb. Law Jour. 201, 317.) Without reference to a part of the demand being within the authority the defendant is estopped from denying that the loan was authorized, because it was within the apparent authority. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; 1 R. S. [Banks 6th ed.], 865, § 14.)

Charles S. Lester for respondent. It was the duty of the Board of Supervisors and of the plaintiff, as a member thereof, to take the proper safeguards to provide that the moneys raised to pay the bounty debt should be properly applied for that purpose. (1 R. S., 369, §§ 21, 23.) Before giving either note, Mann had exhausted the authority thus attempted to be conferred by giving notes to the amount of over \$50,000, and the notes given to the plaintiff were, therefore, clearly unauthorized and void. (*Supervisors of Rensselaer County v. Bates*, 17 N. Y. 242; *Chapleo v. Brunswick Building Soc.*, 29 Eng. [Moak's], 781; *Lowell Savings B'k v. Winchester*, 8 Allen, 109.) The law will not permit the plaintiff, who was one of the public agents of the county of Saratoga,

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to occupy a position in which his private interests would be in conflict with his duty to his principal, and he having thoughtlessly or corruptly placed himself in such position, the law will not aid him. (*Adsit v. Brady*, 4 Hill, 630; *Bassett v. Fish*, 75 N. Y. 389; *Robinson v. Chamberlain*, 34 id. 389; *Shepherd v. Lincoln*, 17 Wend. 250; *Smith v. City of Albany*, 61 N. Y. 444; *Stone v. Hays*, 3 Denio, 575; *N. Y. Cent. Ins. Co. v. Nat. Pro. Ins. Co.*, 14 N. Y. 85; *Loeb v. Hellman*, 45 Sup. Ct. Rep. 336; *Darby v. Pettie*, 2 Duer, 139, 150; *Wood v. Waterville*, 5 Mass. 294.)

EARL, J. All the controlling facts in this case are like those in the case of *Parker v. Board of Supervisors of Saratoga County*, recently decided by us (106 N. Y. 392). Both cases were tried before the same judge, and in that case he ordered judgment in favor of the plaintiff, and in this case against the plaintiff. In that case it was held by us that the county treasurer was authorized to borrow money and give notes therefor binding upon the county, but that his authority to borrow was restricted as there stated; that it is a well settled doctrine of agency, that whenever the act of the agent is authorized by the terms of the power, that is, whenever, comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent; that applying that test to the acts of the county treasurer, nothing was lacking to establish his authority in the transactions with Parker, except that as it was shown that he fraudulently borrowed money and issued obligations in excess of the limit fixed in the resolutions of the board of supervisors and that those transactions may have been a part of the fraudulent dealings; that the acts of the county treasurer were within his actual authority until further evidence should be given by the defendant tending to identify the particular dealings with Parker as a part of the fraudulent dealings; that it was a just rule supported by analogies that when the act of the agent apparently conforms to the authority, and

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includes the particular transaction, and is not in excess of the authority conferred, so far as third persons dealing with the agent can know, the act of the agent is presumptively within the authority conferred; that the burden of proving that it was done after the authority was spent rests upon the principal, and that the burden is not met, nor the presumption overthrown by proof that in the course of the agent's dealings, he fraudulently exceeded his authority, without showing or giving evidence from which a jury would have a right to infer that the particular transaction was unauthorized. There we sustained the plaintiff's recovery on the ground that the loans were made by Parker, in good faith; that it did not appear that the treasurer misappropriated any of the money borrowed of Parker; that the indebtedness which the treasurer was authorized to extend at no time fell short of the loans made by Parker or the notes issued in renewal, and that the defendant had failed to identify the transactions with Parker, as in excess of the actual authority vested at the time in the treasurer. Our decision proceeded upon the theory that the case was before us substantially the same as it would have been if there had been a finding based upon positive proof that Parker had loaned the money to the county treasurer in good faith; that the transaction was authorized by the resolutions of the board of supervisors, and that the money borrowed was actually appropriated to the purposes authorized by the resolutions. The presumption raised by law was held to take the place of positive proof.

Precisely the same facts exist in this case. Beyond dispute the county treasurer was authorized by the resolutions of the board of supervisors to borrow this money and notes in the name of the county were given to the plaintiff in the same form as those which were held by Parker. There is no proof that at the precise time this money was borrowed it was not needed for the purposes specified in the resolutions, or that it was misappropriated. The presumption is that the county treasurer actually borrowed this money for the county and applied it to the uses of the county, and as we held in the Parker case

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we must, under precisely similar circumstances, therefore, hold in this, that this action was not well defended.

But judgment went against the plaintiff at the Special Term from the force and effect given to the proof that at the time he loaned this money to the county treasurer he was a supervisor of one of the towns of Saratoga county, and thus a member of the board of supervisors, and that he had been such supervisor during all the years from and including the year 1863, to and including the year 1875, except the year 1866, and chairman of the board of supervisors in the years 1868, 1869, 1870 and 1875. The trial judge found as matters of fact that the plaintiff being a member of the board of supervisors and knowing the extent of the powers intended to be conferred upon the treasurer by the resolutions of the board, was in the exercise of ordinary care and prudence, bound to ascertain what the treasurer had done under such resolutions, and that he was chargeable with knowledge of the amount of the previous notes which had been issued by the county treasurer; that it was his duty as a member of the board of supervisors to inform himself as to the condition and extent of the debt of the county, and that as supervisor he was presumed to have been acquainted with the condition and extent of the debt of the county during the times he was supervisor. The plaintiff appears to have been defeated upon the ground that as a member of the board of supervisors he was wanting in the active diligence, vigilance and care which were due from him to the county, and that therefore he was responsible to some extent and in some way for the misconduct and misappropriation of the public money by the county treasurer, and hence that he should not be permitted to recover the money loaned by him to the county.

We are unable to perceive upon what theory the plaintiff could, as supervisor, be charged with knowledge of what the treasurer had done under the resolutions, or in violation of them before he borrowed plaintiff's money. The plaintiff as a public officer was bound only to exercise ordinary diligence, and there is no finding and no just inference from the evidence

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that such diligence would have disclosed to him the treasurer's misfeasance, or the condition or extent of the county debt. The treasurer meant to cover up his misdoings and conceal them from the scrutiny of the board of supervisors. He was an official greatly trusted by the people of his county, having been elected for five consecutive terms of three years each to the office of county treasurer. The plaintiff was not bound under such circumstances to believe or suspect that he was a criminal and to take extraordinary precautions to protect the people against his criminal misconduct. There is no evidence that the plaintiff did not, as supervisor, act in good faith and give to the discharge of his duties, that degree of care and vigilance which the law exacts of such public officers dealing with other public officials, who also act under the sanction of an oath and the authority of law.

But we do not perceive what bearing the facts which were supposed to distinguish this case from the Parker case can have, or how they can furnish a defense to this action. Upon the proof as it appears in this record and as we are bound to take it, it is shown that the county treasurer by resolutions of the board of supervisors was authorized to borrow and did borrow in precise accordance with the terms of the resolutions, this money from the plaintiff and actually applied it to the use of the county; and we cannot comprehend how the plaintiff's carelessness or misconduct, as a member of the board of supervisors, furnishes any defense to a cause of action for the money thus loaned. Even if he was chargeable with notice that the treasurer had misappropriated some of the money which he borrowed, and had issued notes far in excess of what he was authorized to issue against the county, yet such facts would not constitute a defense to this action where it appears that the money was honestly loaned and where it must be presumed, in the absence of proof to the contrary, that it was not misappropriated but was actually applied to the use of the county. If it had appeared that the county treasurer, when he loaned this money, was acting in excess of his actual authority, and that he had misappropriated the money, and

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the plaintiff was seeking to hold the principal and maintain this action because the agent in the transaction with him acted within the scope of his apparent authority, we would have had a different case to deal with, and there would have been some room for the application of the principles of law upon which the plaintiff has thus far been defeated.

We are therefore of opinion that the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except PECKHAM, J., not sitting.

Judgment reversed.

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SOLOMON M. SCHWARTZ et al., Appellants, v. JOSEPH HYMAN,
Respondent.

In February, 1879, defendant wrote a letter to plaintiffs requesting them to send to P. a full line of samples "suitable for spring and summer at the lowest figure," adding "I will guarantee the payment of any goods you may sell him, hoping you will comply with my request and attend to it at once." Plaintiff sent the samples as requested; P. ordered various bills of goods from time to time and paid for his purchases up to 1883; for goods sold during that year he did not pay. In an action upon the guaranty, *held*, that it was not a continuing one, but referred simply to and covered the one transaction, *i. e.*, the goods ordered from the samples sent as requested; and that, therefore, plaintiffs were not entitled to recover.

(Submitted November 30, 1887; decided December 20, 1887.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 29, 1885, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

The nature of the action and the material facts are stated in the opinion.

Blumenstiel & Hirsch for appellants. The instrument in question was a continuing guaranty. (*Agawam Bk. v. Stern*, 18 N. Y. 510, 511; *City Nat. Bk. v. Sherill*, Hill and Denio, Supp. 219; *Merchant's Nat. Bank of Whitehall v. Hall*, 83 N. Y. 343, 344; *Tooth v. Elgutter*, 45, Am. R. 103; *Gates*

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v. *Johnson*, 24 N. Y. 64; *Scott v. Myall*, 60 Am. Dec. 487; *Lowe v. Beckwith*, 58 id. 659; *Menard v. Scudder*, 56 id. 610, 611; *Hotchkiss v. Barnes*, 34 Conn. 27.) If the language was in doubt then the evidence to explain what was apparently intended was proper, and the question on this point should have gone to the jury. (*White's Bank v. Myles*, 73 N. Y. 335; *Gates v. McKee*, 13 id. 232; *Evansville Nat. B'k v. Kaufmann*, 93 id. 281.)

Wm. N. Cohen for respondent. A contract of guaranty is to be construed, with the object of arriving at the intention of the parties. (*Morgan v. Boyer*, 39 O. St. 326; *Bank v. Kaufmann*, 93 N. Y. 273, 281; *Rindge v. Judson*, 24 id. 64, 70; *Crist v. Burlingame*, 62 Barb. 351, 356; *Lawrence v. McCalmont*, 2 How. [U. S.] 426, 449.) To ascertain the intention of the parties in the action at bar, attention should not be restricted to the single clause "I will guarantee the payment of any goods which you may sell him," which forms only part of a sentence conveying but a single indivisible idea. (*White's Bank v. Myles*, 73 N. Y. 235; *Knowlton v. Hersey*, 76 Me. 345; *Morgan v. Boyer*, 39 O. St. 324.) Guaranties like other contracts are subject to all the limitation expressed therein, and also to all such as may be fairly implied from their language. (*Bank v. Kaufmann*, 93 N. Y. 273, 282; *Rindge v. Judson*, 24 id. 64; *Douglas v. Reynolds*, 7 Pet. 122; Baylies on Sur. & Guar., etc., § 124.) When no time is fixed and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time. (*Fellows v. Prentiss*, 3 Denio, 512, 519; *Crist v. Burlingame*, 62 Barb. 351, 358; Baylies on Sur. & Guar., etc., § 7.) *Bank v. Hall*, 83 N. Y. 338; *White's Bank v. Myles*, 73 id. 335; *Bell v. Buen*, 1 How. [U. S.] 169, 186; *Bank v. Kaufmann*, 93 N. Y. 273, 284; *Morgan v. Boyer*, 39 O. St. 324.) The fact that the guaranty is unlimited in amount raised a legal presumptive that it was not intended to be unlimited as to the time, but was to be confined to the first lot

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of goods sold. (*Rogers v. Warner*, 8 John. 192; *Whitney v. Groot*, 24 Wend. 82; *Morgan v. Boyer*, 39 O. St. 324.) The words "any" or "all" do not determine the nature of a guaranty. (*Rogers v. Warner*, 8 John. 119; *Whitney v. Groot*, 24 Wend. 82; *Morgan v. Boyer*, 39 O. St. 324; *White v. Reid*, 15 Conn. 457; *Craemer v. Higgiman*, 1 Mason, 323; *Rapelye v. Barley*, 5 Conn. 149.) There was no such ambiguity in the guaranty involved in this suit as required the court to go into the evidence of all the attending circumstances. (*Crist v. Burlingame*, 62 Barb. 355, 356; *Lawrence v. McCalmont*, 2 How. [U. S.] 426; *Rindge v. Judson*, 24 N. Y. 64, 70.)

EARL, J. The action was brought upon the following guaranty:

"DES MOINES, Feb. 15, 1879.

'Messrs. SWARTZ & JEROWSKI:

"GENTLEMEN AND FRIENDS.—This will inform you that the co-partnership between Weinstock & Posner will be dissolved by the 1st of March, 1879. You will be kind enough to send Jacob Posner a full line of samples, of course suitable for spring and summer, at the lowest figures. And I will guarantee the payment of any goods you may sell him. Hoping you will comply with my request and attend to it at once you will oblige

"Your friend,

"JOSEPH HYMAN,

"Of the firm of Goldman & Hyman."

The defendant and Posner were brothers-in-law and both lived at Des Moines. In accordance with this letter a line of samples was sent to Posner, and he subsequently ordered goods of the plaintiffs. They sold him goods in March, 1879, in May, 1879, August, 1880, February and October, 1881, and in February and November, 1882. All these goods were paid for, and between August 9, 1883, and November 12, 1883, they sold and delivered to him other goods which were not paid for, and then this action was commenced to recover the price of such goods upon his guaranty. The courts below held

Opinion of the Court, per EARL, J.

that the last sales were not covered by the guaranty and we are of the same opinion.

The defendant's letter, we think, did not constitute a continuing guaranty. It was a request that the plaintiffs would send Posner a full line of samples of their goods suitable for spring and summer. That evidently referred to but one transaction, and not to a number of transactions that might run through a series of years, and the phrase that the defendant would "guarantee the payment of any goods which you may sell him," had reference, we think, to the goods which might be ordered from the samples which they were requested to send. The further language expressing the hope that the plaintiffs would comply with the request and attend to it at once, tends to show that but a single transaction was in the contemplation of the guarantor.

While the construction of this letter is not entirely free from doubt, we think the most obvious, reasonable and natural construction of the language used is that which we have thus given. Very little, if any aid for the construction of this guaranty can be derived from reported cases. The general rule recognized by all the authorities is that the language of such a guaranty should be interpreted with a view of reaching the intention of the parties thereto, and that while the guarantor should be held to every obligation fairly and reasonably embraced within the language which he used, his language should not be strained beyond its obvious meaning for the purpose of enlarging his liability. (*Rindge v. Judson*, 24 N. Y. 64; *White's Bank v. Myles*, 73 id. 335; *Evansville Nat. Bank v. Kaufmann*, 93 id. 273.)

The construction of such a guaranty must always be largely influenced by the precise language used, viewed in the light of the circumstances attending its execution; and giving full effect to all the language thus viewed, we think the plaintiff was properly non-suited.

The judgment should be affirmed

All concur.

Judgment affirmed.

Statement of case.

JOHN LILLY, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the following facts appeared. Plaintiff was a brakeman in defendant's employ, and was on duty at its depot in New York. An engine was moving down to take a car loaded with ashes standing on one of the tracks; plaintiff went to the rear of the car to get upon it for the purpose of attending to the brake, while a car-coupler took his position at the front of the car to couple it to the engine. The car had no step to get upon it; plaintiff was obliged to take hold of the brake-rod and put his foot on one of the bumpers; the engine came down so rapidly that the car-coupler could not make the coupling. The force of the collision threw plaintiff from the car; he was pushed along by the brake-beam for about two hundred feet, and then the car passed over him, causing the injury complained of. Plaintiff's evidence tended to show that the brake of the ash car was out of order so that it could not hold the car, of which defect defendant had notice; that it was customary, when cars were standing on a track, to have their brakes set for the purpose, among others, of preventing their being moved far, if struck in making up trains, collision from such a cause being of frequent occurrence; that if the brakes of this car had been in proper condition and set tight, the car would not have been moved by such a collision more than five or ten feet. Plaintiff was nonsuited. *Held* (EARL and FINCH, JJ., dissenting), that conceding plaintiff was knocked off the car through the negligence of his co-employees, and was so placed in a dangerous position, yet that, under the circumstances, it might have been found, he could have extricated himself without injury, if the brakes had been in proper condition, and that the defect was the proximate cause of the injury; that, therefore, the question should have been submitted to the jury and the nonsuit was error.

Also, *held* (EARL and FINCH, JJ., dissenting), that an accident of this nature might fairly and reasonably be apprehended as a possible result of a failure on the part of defendant to keep the brakes in good condition; that the fact that no such accident had ever before happened was not conclusive in this respect, as it was not necessary to see in advance all the possibilities of danger which might result from such an omission, or to show that an exact counterpart of the accident had happened before. Defendant proved that it was the duty of all employees, when the brakes of a car standing on a track were out of order so that they could not be set, to "chock" the wheels, and claimed that the omission to do so in this case was negligence of a co-employee contributing to the injury. *Held* untenable; that the failure to have the brakes in order could, under the circumstances, be fairly alleged as the cause of the injury.

(Argued October 18, 1887; decided December 23, 1887.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 11, 1885, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

The nature of the action and the material facts are stated in the opinion.

Samuel D. Morris for appellant. The defendant cannot escape or shift its liability by proof that it intrusted the performance of the duty to provide a competent foreman to communicate its orders, and to furnish and maintain suitable, adequate, safe and perfect machinery, implements and appliances necessary to be used by the plaintiff in its business, to an agent or servant. (*Kain v. Smith*, 80 N. Y. 458, 467; *Fuller v. Jewett*, id. 46; *Creed v. Hartman*, 29 id. 591; *Robert v. Johnston*, 58 id. 613; 89 id. 375, 379; *Laning v. N. Y. C. R. R. Co.*, 49 id. 521, 532; *Com. v. D., L. & W. R. R. Co.*, 81 id. 206; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Besel v. N. Y. C. & H. R. R. R. Co.*, 70 id. 163; *Mehan v. Syr. & B. R. R. Co.*, 73 id. 585; *Malone v. Hathaway*, 64 id. 5; *Flike v. B. & A. R. R. Co.*, 53 id. 549; *Bensing v. Steinway & Sons*, 101 id. 547; *Stringham v. Stewart*, 100 id. 516; *Sheehan v. N. Y. & H. R. R. Co.*, 91 id. 332; *Pantzar v. Tilly F. Min. Co.*, 99 id. 368.) A corporation is liable for negligence in respect to such acts and duties as it is required to perform as master without regard to the rank or title of the agent intrusted with their performance. (*Flike's Case*, 53 N. Y. 553; *Crispin v. Babbitt*, 81 id. 516; *Bensing v. Steinway & Sons*, 101 id. 547; *Rembe v. N. Y. Ont. & W. R. Co.*, 102 id. 721; *Pantzar v. Tilly F. Min. Co.*, 99 id. 376.) The negligence of the defendant not only contributed to, but was the efficient and proximate cause of the injuries received by the plaintiff. (*Flike's Case*, 53 N. Y. 549; *Healy v. Ryan*, 25 Week. Dig. 23; *Wasmer v. D., L. & W. R. R. Co.*, 80 N. Y. 212; *Kennedy v. Mayor, etc.*, 73 id. 365; *Smith v. B. & N. A. R. M. P. Co.*, 86 id. 408.) The plaintiff is not chargeable with contributory negligence. (8 Allen, 44; *Stringham*

Statement of case.

v. *Stewart*, 100 N. Y. 516; *Palmer v. Dearing*, 17 Week. Dig. 145.) The question of the contributory negligence of the plaintiff, and also the question whether the defendant was guilty of negligence which caused or contributed to the plaintiff's injuries, were both questions of fact which should have been determined by the jury. (*Ochsenbein v. Shapley*, 85 N. Y. 214; *Hart v. H. R. Bridge Co.*, 80 id. 623; *Stackus v. N. Y. C. & H. R. R. Co.*, 79 id. 464; *Kain v. Smith*, 89 id. 385; *Plank v. N. Y. C. & H. R. R. Co.*, 60 id. 607; *Sherry v. N. Y. C. & H. R. R. Co.*, 25 Week. Dig. 287.) The defendant having failed to discharge its duty to the plaintiff by providing an incompetent foreman, inadequate lights, a car with a defective brake and inadequate appliances, the negligence of co-servants contributing to the injury will not affect the plaintiff's right to recover. (*Com. v. D., L. & W. R. R. Co.*, 81 N. Y. 206; *Kain v. Smith*, 25 Hun, 146; 89 N. Y. 378; *Booth v. B. & A. R. R. Co.*, 73 id. 38; *Cayzer v. Taylor*, 10 Gray, 274; *Wilds v. H. R. R. Co.*, 23 How. 492; *O. & M. R. R. Co. v. Collam*, 38 Am. R. 134.)

B. F. Tracy for respondent. To render the defendant liable it must appear that its negligence was the proximate cause of the injury. (2 Thompson Neg. 1089; Wharton Neg. § 134; *Hoag v. Lake Shore & M. S. R. R. Co.*, 85 Penn. 329; *West Mahanoy Township v. Watson*, 8 Cent. R. 543; *Futein v. Hurley*, 98 Mass. 211; S. & R. on Neg. § 10; *Fogg v. Nahant*, 98 Mass. 578; *Carter v. Towne*, 103 Mass. 507; *Lewis v. R. Co.* 54 Mich. 55; *Matteson v. Davis*, 20 Pa. St. 436; *Lannen v. Albany Gas Co.*, 44 N. Y. 459.) There being no dispute about the facts, the question of what was the proximate cause of the injury was a question of law to be determined by the court. (*West Mahanoy Township v. Watson*, 8 Cent. R. 543; *Futein v. Hurley*, 98 Mass. 211.) Plaintiff's injury was not of such a consequence as, under the circumstances, might and ought to have been foreseen as likely to flow from leaving the brake in the condition plaintiff claims it was in. (*Hubbell v. City of Yonkers*, 104 N. Y. 439; *Sutton v. N. Y. C. R. R. Co.*, 66 N. Y. 249.)

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. The plaintiff was run over by what is termed in the case an ash car, on one of the tracks of defendant's road, near the Grand Central Depot in New York, on the 30th of October, 1880, and the accident resulted in the loss of both his legs. He brought an action against defendant to recover the damages which he thus sustained, and upon the trial he was nonsuited and the nonsuit upon appeal was sustained by the General Term and from the judgment of affirmance the plaintiff has appealed to this court.

Upon the trial the plaintiff gave evidence tending to prove the following facts: He was a brakeman in the employment of the defendant, and was assigned to duty in and about the Grand Central Depot, and the yards and grounds adjoining. Of the several tracks running north from that depot at the place of the accident it is only necessary to notice two, which are called the "shore line" and the "express" tracks, the shore line being the westerly and the express being the next adjoining track on the east.

Just before the happening of the accident, which occurred at about seven o'clock in the evening, the plaintiff was on an engine which stood on the shore line a little above (north of) the Forty-seventh street bridge and in the yard of defendant. He was talking to the engineer and to one of his own fellow workmen, when the foreman of his gang came up and asked the engineer if he was coupled on to a car which stood in the rear of his engine. One of the men on the engine replied "yes," when he was told to pull the pin and come in on the express track, and (as the witness understood him) get the air car. The foreman was subsequently sworn and says that he said to get the ash car. The difference is not important only as showing that the order as to what car to get was not understood, and that the *ash* car was not then looked for. When the order was given, plaintiff and his fellow workman got off the engine, the plaintiff pulled the pin out behind and the engine started north to go on a switch which was 184 feet north of the Forty-seventh street bridge, for the purpose of backing down on the express track to get the car spoken of.

Opinion of the Court, per PECKHAM, J.

The plaintiff and his companion Buckley, who was a car coupler, then started south between the shore line and the express tracks for the purpose of finding the car spoken of by the foreman; the engine having been switched from the shore line to the express track, backed down on the latter track while the men were going south. They passed under the Forty-seventh street bridge, and when just south of the bridge they came to a car on the express track, the north end of which car stood about four feet south of the north end of the bridge. The plaintiff was slightly in advance of his companion and when they came upon the car they supposed it was the one that was to be moved. Buckley prepared to make the coupling. He removed the pin from the bumper on the north end of the car and got ready to make the coupling, while the plaintiff went to the south end and prepared to get up on it for the purpose of attending to the brakes when the car was coupled to the engine. The car was loaded with ashes from a heap of ashes that had been collected by the side of the car. As Buckley prepared to attend to the coupling he saw the engine coming back so rapidly that he could not make it and had to jump out of the way to save himself. He had left his own lamp on the rear of the tank of the engine for the purpose, as he said, of lighting the rear of the engine, so he could see to make the coupling as the engine moved down to the car. The plaintiff, in the meantime, had set his lamp down at the rear of the car for the purpose of getting on it, and as it had no step he was obliged to take hold of the brake rod and put his foot on one of the bumpers, and in this way was obliged to use both his hands. He was in the act of swinging himself upon the car when it was struck by the engine, and the force of the collision knocked him off. He had hold of the brake rod with both hands, and the force of the blow unloosed his hold, knocking him off the bumper and across the track. He called to the engineer to attract his attention, expecting that he might hit the car again. When he fell across the track the brake beam, which is a beam connecting the shoes on either side of the car,

came against him and shoved him along, the plaintiff rolling in front of it for some distance. Finally his shoulder got under the brake beam and shoved it up somewhat and then the car passed over him, the wheels crushing both legs.

The plaintiff was knocked off the car when the rear end was between thirty and forty feet south of the Forty-seventh street bridge, and, as might be inferred from the evidence, the car did not pass over him until he reached what is termed the hydrant between Forty-sixth and Forty-seventh streets, about forty feet north of Forty-sixth street, the car proceeding south as far as Forty-sixth street after it had run over the plaintiff. The plaintiff was picked up and taken to the hospital where both legs were amputated, and he remained in the hospital for several months thereafter. This ash car was a car which was used for the purpose of carrying away the ashes from the depot and the yard adjoining to a place several miles north on the Harlem where the ashes were dumped. It had been loaded that afternoon and had been left at the spot where the collision took place.

The brakes on this car were out of order. In the language of one of the witnesses the difficulty was that the connection rod connecting the shoes of the brake with the brake staff came up against the brake staff and would not hold the car. The connection rod was too long. It is the rod to which the brake chain is attached at one end connecting the staff to the rod, and the brake chain wound around the staff and drew the rod up to the staff before the shoes were brought up against the wheels, and then, of course, no further turn could be made; and in this way the brake was, as the witness says, practically useless. There was evidence in the case from which a jury might be asked to infer that the defendant had notice of the defective character of the brake some time before the happening of the accident, and that it had attempted once to repair it, but had failed to make it work properly. There was evidence tending to show that the engine in backing toward the car went at the rate of from eight to ten miles an hour. The car was not seen by the engineer, and he was not expecting it.

Opinion of the Court, per PECKHAM, J.

at that particular point. Nor did the plaintiff or his companion, when they went down to look after the car spoken of by their foreman, know where the car was, nor did they expect to find this ash car. There was evidence that it was customary to set the brakes when cars were left on the tracks, and, as might be inferred, for the purpose of keeping them steady, and to prevent their being moved far, if struck while making up trains, or in moving engines or cars about the yard, evidence being given that collisions from such a cause were of frequent occurrence. There was also evidence that if a car loaded as this one was with ashes, standing on a track in which there was a slight curve, was struck by an engine going at the rate of eight or ten miles an hour, if the brakes were in proper condition and set tight, that the car would not move from the effects of such a collision more than from five to ten feet, where, as in this case, with the car standing with unset brakes, consequent upon the brakes being out of order so that they could not be used, upon being struck by an engine, it ran from Forty-seventh street bridge south to the Forty-sixth street bridge, a distance of 250 feet, having, in the meantime, run over the plaintiff at a point about forty feet north of Forty-sixth street. Thus from the point where the plaintiff fell from the car on to the track to the point where he was finally run over and his legs crushed by the car, was a distance of nearly 200 feet.

Upon this evidence the defendant made a motion for a nonsuit, which at that stage of the trial was denied by the court. The defendant then gave evidence tending to show that the brake upon this car was in good condition; that it had been repaired but a short time previous to the accident and that at the time of the accident the chain attached to one end of the connecting rod, after it had been wound up so that the shoes were set against the wheels perfectly tight, had still several inches unwound. They also gave evidence tending to show that the co-employee of the plaintiff, Buckley, was guilty of negligence in leaving his lamp on the rear of the tank of the engine, at the time he started south for the purpose of getting

Opinion of the Court, per PUGHAM, J.

the car spoken of by his foreman, and that the lamp, if it had been in the hands of Buckley, could have been used by him for the purpose that it was intended, that is, in giving signals to the engineer to stop, which he should have done as soon as he discovered the ash car, and that would have prevented the collision. It may be remarked here, that the witness Buckley swore that he left the lamp where he did in obedience to orders from a former foreman, in order, in a case like this, to see in making the coupling. Other evidence was given on the part of the defendant upon some other points in the case, which it is not necessary to mention in the view we take of the facts.

The motion for a nonsuit was renewed at the end of the defendant's evidence and was granted by the court. In this we think the learned court erred. We think that, upon all the evidence in the case, it should have been submitted to the jury to determine as to what was the condition of the brake on the night in question, and if out of order, whether the defendant was guilty of any negligence in that respect which caused the injury, and also upon the question of any contributory negligence on the part of the plaintiff. In order to sustain the nonsuit the learned counsel for the defendant claims that the collision of the engine with the ash car was the proximate cause of the plaintiff's injury, and that no negligence of the defendant in any degree tended to bring about such collision, but that, on the contrary, the collision was the result of the negligent act of the plaintiff and his co-employees.

We do not think that it can be said that the collision of the engine with the ash car was the proximate cause of the plaintiff's injury. Assuming that he was knocked off the car through the negligence of the engineer, or of the co-employee of the plaintiff, Buckley, by which the collision was caused, yet, under the facts in this case, we think it can be said that the result of the collision was to place the plaintiff in a dangerous position, from which position he might have extricated himself without injury, if the brakes on the ash car had been in proper condition. He was not injured by being thrown from

Opinion of the Court, per PECKHAM, J.

the ash car, on the contrary, if the ash car had moved but a few feet after he fell upon the track he would have sustained no injury whatever, if his evidence is to be believed. It was not until this ash car had moved a distance of some 200 feet that the brake beam was finally raised sufficiently high to pass over the shoulder of the plaintiff so as to allow his legs to come in contact with the wheels.

A jury might be asked upon this evidence to say that but for the fact of the brakes being out of order and failing to hold the car at all, the plaintiff would have sustained no injury from the collision. In this way we think it can be said, with truth, that the proximate, direct cause of injury was the condition of the brakes on the ash car, and that the only effect of the collision was to place the plaintiff in a dangerous position from which he might have been extricated without injury provided the brakes had been in proper order.

The duty of an employer to provide safe and proper machinery for his employees, and the extent of that duty, are too well settled in this court to need the citation of authorities on that subject. The difficult point in this case, and the one in regard to which we have had considerable doubt, is whether, assuming there was a failure of the company to have proper brakes upon this ash car, that failure really bore such a relation to the happening of the accident as to render the company liable. Can it be said that this accident (or one of such a nature) might fairly and reasonably be apprehended as a possible result of a failure on the part of the company to perform its duty as to the brakes, or was it of such a character that its occurrence would never have reasonably been anticipated, and that it therefore bore no fair and just connection with the bad condition of the brakes? After considerable reflection, and with some hesitation, we have come to the conclusion that we cannot say there was no such relation. It is a border case and much might be said on the other side. It is, perhaps, true that an injury such as the plaintiff sustained never before happened in such a manner. That is not, as we think, conclusive upon the question of defendant's exemption.

Opinion of the Court, per PECKHAM, J.

The purpose of brakes upon a car is to control it to a much greater extent than could be done without them. They are used, not alone when the car is in motion, and to retard its progress; the evidence in this case shows they are constantly used when a car is at rest, and for the purpose of rendering it less easy and less liable to be moved. There is thought, and properly thought, to be danger as well as inconvenience resulting from permitting a car to stand upon the tracks at any time with brakes unset. It is not necessary, in order to hold a defendant liable, so far as this point is concerned, to be able to see in advance all the possibilities of danger which might result from such omission. Accidents are continually happening, the exact counterpart of which may not to our knowledge have occurred before.

That is not the test. If the accident is of such a nature that its occurrence might reasonably be apprehended from the failure to take the precaution in question, and if it did thus happen, then a relationship is established between such failure and the cause. Now, the direct and immediate cause of this accident was the car running over the plaintiff. Granted that the plaintiff would not have been run over if he had not first been knocked off the car by the collision with the engine. That only proves that by the neglect of a co-employee he was placed in a dangerous position, and being thus placed he is injured because the car was not supplied with a brake in a good condition. He is injured by being run over by the car which was moving at a time when, if it had had a brake in good condition and properly set, it would have been stationary. One of the dangers to be apprehended from a car in motion at a time when it ought to be stationary is that it may injure people by running over them. It is so obvious that there is danger of some kind to be apprehended from leaving a single car without the brakes being set, even when the car is in the yard, that the defendant proved in this case it was the duty of all employees to set the brakes of such a car, and that if the brakes were out of order it was the duty of the employees to "chock" the wheels of the car thus left; and the defendant

Opinion of the Court, per PECKHAM, J.

claimed that the failure to thus "chock" the wheels of this car (if the brakes were really in the condition as charged by the plaintiff, which it denied), was the negligence of a co-employee contributing to the injury for which it was not responsible.

The duty of a brakeman calls him to situations of peril in and about standing as well as moving cars, and this peril is of a nature that is recognized as existing by the railroad authorities, and they have assumed to reduce it as far as they reasonably can by the appliance, among other things, of brakes, not alone on that account, but that is one of the objects. The failure to have the brakes in order may, under these circumstances, be fairly alleged as the cause of the accident.

It is stated also by the counsel for defendant that even if the brakes had been in perfect order, they might not have been set, and if they had not been set this accident would have occurred; and that a failure to set them would have been the failure of a co-employee of the plaintiff for which the defendant would not be responsible. As already stated, the evidence in the case is that it is usual and customary, and the duty of defendant's employees, to set brakes upon a car situated as this one was. If it be usual and customary, I think it may be reasonably presumed that the employees of the defendant would do their duty and set the brakes. Certainly no presumption of a non-performance of their duty ought to be indulged in for the purpose of absolving the defendant from liability arising from the brakes being out of order.

It is true that it cannot be said with absolute certainty that if the brakes had been in good condition and properly set, and the collision had occurred, that no injury to plaintiff would have followed. But that conclusion certainly may be reached with reasonable probability from the facts testified to on the part of the plaintiff. In this way (if his evidence be true), we think it may be said that the failure to have the brakes in good condition does bear such a relation to the happening of the accident as to make it a question of fact for the jury to determine upon all the evidence in the case whether this

Statement of case.

injury would have occurred if the brakes had been in good order and properly set. Even if it could not with absolute certainty be said that it would not have happened but for the omission of the defendant to have the brakes in proper order, yet assuming the evidence on the part of the plaintiff to be true, it would seem as if there were sufficient to go to the jury upon that question. Absolute certainty is not attainable in this class of cases, and is not requisite, in our judgment, before submitting the inferences to be deduced from the facts to the jury.

We think there was no contributory negligence, as matter of law, on the part of the plaintiff, and that the case should have been submitted to the jury. Other questions were discussed, but they may not arise upon a new trial. For the reasons already suggested, we think this judgment should be reversed and a new trial granted, costs to abide event.

All concur, except EARL and FINCH, JJ., who dissent on the ground that the defect in the brake was not the proximate cause of the accident, that the defendant was not bound to anticipate such an accident from a defective brake, that there was no culpable neglect chargeable to defendant and that the accident was caused by the negligence of co-servants.

Judgment reversed.

ELLEN T. HAYES, Respondent, v. CHARLES J. NOURSE, JR.,
Appellant.

A party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal.

(Argued December 13, 1887; decided December 23, 1887.)

This is a motion to dismiss an appeal as irregular and void for the reason that the judgment from which said appeal purports to be taken, was satisfied of record before the service of notice of appeal.

Opinion of the Court, per DANFORTH, J.

Judgment was recovered by plaintiff against defendant in the Court of Common Pleas on April 4, 1887, for \$3,528.26, from which the defendant took an appeal to the General Term of said court, where the judgment was affirmed, and on June 10, 1887, a judgment of affirmance thereof and for \$84.24, costs of said appeal, was entered.

On June fifteenth the defendant voluntarily paid both of said judgments, applied to plaintiff's attorney for, and received satisfaction pieces thereof, and on the same day filed the same and caused said judgments to be satisfied of record. No process had been issued or proceeding taken to enforce payment of said judgments. On September 27, 1887, the defendant served notice of appeal to this court.

Arthur P. Hilton for motion.

Strong & Cadwalader opposed.

DANFORTH, J. The defendant's practice in paying the judgment before appealing from it is not to be condemned. It is rather to be encouraged. A party who recovers at the trial term and, against his adversary's appeal, sustains the recovery at the General Term, might fairly be deemed entitled to the fruits of his action without further delay. The law, however, allows one more appeal, but although it is taken, the successful party may, nevertheless, enforce his judgment by execution, and so collect its award, unless the defeated party secures its ultimate payment by a deposit of money or an undertaking. Why may he not simplify the matter by placing the funds at once in the hands of the party, who, if the appeal fails, will be ultimately entitled to them? By so doing he will save the costs of execution and do no harm to his creditor. We think he should not, by a temporary submission to the decision of the court, be placed in a worse position than if he awaited execution and settled it with sheriff's fees. In *Dyett v Pendleton* (Court of Errors, 8 Cow. 326), an execution had, in fact, issued, but the court held that even a voluntary payment of the judgment would have been no reason against a writ of

Opinion of the Court, per PECKHAM, J.

error and in a subsequent case, *Clowes v. Dickenson* (8 Cow. 328), Spencer, Senator, referring to the decision just cited, says: "I feel confirmed on reflection that no matter how the money is paid or collected, this cannot affect the right to try error on appeal." To the same effect are many subsequent decisions, and it must be deemed too well settled by authority to require further discussion, that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal. (1 Code Rep. [N. S.], 415; Ct. of App. 1852; *Sheridan v. Mann*, 5 How. Pr. 201; 42 Barb. 441.) The statute giving the right to appeal only requires that the judgment in question shall be final (Code, § 190), that the appeal shall be taken within one year after it is entered (§ 1325), and, anticipating such a case as that now presented, provides that if the judgment appealed from is reversed, the appellate court may make or compel restitution. The same rule prevailed before the Code, and it was applied whether the judgment was paid before or after writ of error brought. The only difference was in the manner of proceeding to inform the court of the facts on which the right to restitution depended. (Tidd's Practice, 1033, 1034; *Sheridan v. Mann*, *supra*.)

The appellant's practice has been regular, and the motion to dismiss the appeal should be denied, with \$10 costs

All concur.

Motion denied.

Statement of case.

BERTHA WUESTHOFF et al., by Guardian, etc., Appellants, v.
GERMANIA LIFE INSURANCE COMPANY, Respondent.

While an obligation due an infant may, with or without express words authorizing it, be discharged by payment to the guardian of the infant, it is with the qualification that the guardian is authorized to receive payment.

The power of a parent to appoint, by deed or will, a guardian of his infant children, does not exist in the absence of a statute conferring it, and the legislature may define, limit and regulate the authority of guardians and prescribe the condition under which it shall be exercised.

It seems the exercise by courts of a power, to disregard a particular provision of a statute, on the ground that it is directory, not mandatory, should be with great caution.

The provisions of the statutes of this state in reference to testamentary guardians relate exclusively to domiciliary guardianship, under wills or deeds of residents of this jurisdiction. The rights and powers of the guardian are strictly local, and circumscribed by the jurisdiction of the government which clothed him with his office.

It seems, however, that a payment by a debtor in this state to a foreign guardian will be good, if the guardian, by the law of the state from which he derives his appointment, is authorized to receive it.

Defendant issued a policy of insurance on the life of W., payable to A., his wife. In case of her death before the death of the insured the policy provided that the amount of insurance "shall be payable to her children * * * or to their guardian, if under age." W., resided in New Jersey, where the policy was issued, and continued so to do up to the time of his death. He survived his wife and remarried. By his will he appointed his second wife guardian of his children by the first wife, who were infants. She, as such guardian, served on defendant notice and proof of the death of W., and of his first wife, and defendant thereupon paid to her the amount of the policy. The laws of New Jersey provide that a father may, by deed or will, appoint a guardian for his minor children (N. J. R. S. 664, § 1), but by another section (p. 762. § 48), provide that every testamentary guardian "shall, before he exercises any authority over the minor or his estate, appear before the Orphan's Court and declare his acceptance of the guardianship * * * and shall give bond * * * for the faithful execution of his office unless it is otherwise directed by the testator's will." The guardian at the time of receiving payment on the policy had not declared her acceptance of the guardianship or given a bond as required. In an action by the children to recover the amount of the policy, *held*, that the case was to be governed by the laws of New Jersey; that the giving of security was a necessary prerequisite

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to the exercise of any authority by the guardian over the estate of the ward; that the guardian, therefore, was not authorized to receive payment; and that such payment was not a defense to the action.

The will was executed under seal. It was claimed that the statutory limitation did not apply, as that relates to a guardian appointed by will, while here the appointment was by deed. *Held* untenable; that the unnecessary addition of a seal did not change the character of the instrument or justify treating it as in part a will and in part a deed.

The policy was, by its terms, payable "sixty days after due notice and proof of the death." It was claimed by defendant that plaintiffs, by repudiating the act of the guardian in receiving payment also repudiated her act in giving notice, etc., and so that no notice or proof of death had been furnished. *Held* untenable; that while the guardian had no power to interfere with the infants' estate before giving security, she had sufficient authority to take a step in the interest of the infants to accelerate the maturing of the claim; also, that defendant was precluded by accepting and acting upon the notice without objection.

It was also claimed that, as the guardian had not qualified, there was no person authorized to receive payment, and, until there was, defendant was not liable. *Held* untenable; that the guardian *ad litem* was a guardian within the meaning of the policy, and was authorized to receive payment and execute a discharge.

(Argued October 3, 1887; decided January 17, 1888.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 3, 1885, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial without a jury.

This action was brought by plaintiffs, the infant children of Friedrich Wuesthoff, deceased, upon a policy of insurance upon the life of their father, payable to Amelia, his wife, or, in case of her death before his, to their children.

The material facts appear in the opinion.

Charles B. Meyer for appellants. This suit was properly brought by the plaintiffs, they, as infants, being represented by their guardian *ad litem*. (*Segelkin v. Meyer*, 94 N. Y. 473; *Higgins v. Hannibal & St. Jo. R. R. Co.*, 36 Mo. 418; *B. & O. R. R. Co. v. Fitzpatrick*, 36 Md. 619; *Price v. Phoenix M. L. Ins. Co.*, 17 Minn. 500; *Clemmitt v. N. Y. Life Ins. Co.*, 76 Va. 360; *Piggott v. Thompson*, 3 Bos.

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& P. 149; *Gilmore v. Pope*, 5 Mass. 491; *Taunton Co. v. Whiting*, 10 id. 327; *Baley v. Onondaga Ins. Co.*, 6 Hill, 477; *Lane v. Columbus Ins. Co.*, 2 Code R. 65; Code, § 474; Rule 51.) Due notice and proof of death, as required by the policy, was given to the defendant. (*Kennedy v. Home Ins. Co.*, 9 Ins. L. J. 359; *Sims v. State Ins. Co.*, 47 Mo. 60; *May on Insurance*, § 465; *Guardian Life Ann. & Trust Co. v. Ins. Co.*, 9 Weekly Notes of Cases, 425; *May on Insurance*, §§ 466, 512; *Eclipse Ins. Co. v. Schoener*, 2 Cin. Supr. Ct. Rep. 474; *Taylor v. Aetna L. Ins. Co.*, 13 Gray, 434; *Day v. Mut. Ben. L. Ins. Co.*, 1 MacArthur, 600; *Hincken v. Mutual Ben. Life Ins. Co.*, 6 Lans. 24; 50 N. Y. 657; *Northwestern Ins. Co. v. Atkins*, 3 Bush. 333; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17; *Sims v. State Ins. Co.*, 47 Mo. 60; *Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 172; *Kernochan v. Bowery F. Ins. Co.*, 17 N. Y. 433; *Pratt v. N. Y. Cent. Ins. Co.*, 55 id. 505; *Bodle v. Chenango Co. Ins. Co.*, 2 id. 58; *Johnson v. Columbia Ins. Co.*, 7 Johns. 315.) Defendant having alleged in its answer that the will of the insured "was duly admitted to probate," etc., cannot now be heard to say that the instrument "operated as a deed." (*Douglass v. Cooper*, 3 Myl. & K. 378; *Jarman on Wills* [5th ed.] 27; *Colton v. Roes*, 2 Paige, 396; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Bogardus v. Clarke*, 4 Paige, 623; *Nalle v. Fenwick*, 4 Rand. 585; *Dannington v. Bosland*, 3 Post. 11; *Russell v. Dickson*, 1 Con. & Law, 284; 2 Greenl. Ev. § 672; 1 *Williams Exrs.* [6th Am. ed.] 549; *Peeble's Appeal*, 15 S. & R. 42; *Tomkins v. Tomkins*, 1 Story, 547; *Willard Exrs.* 60, 61, 226; *Redfield on Wills*, 63; *Vanderpoel v. Van Valkenburg*, 6 N. Y. 190; *Robertson v. Dunn*, Walk. [Miss.] 520; *Armstrong v. Armstrong*, 1 Am. Prob. Repts. 206; *Gillham v. Mustin*, 4 Ala. 365; *Shepherd v. Nabors*, 6 id. 631; *Thompson v. Johnson*, 19 id. 59; *Mosser v. Mosser* 32 id. 551; *Walker v. Jones*, 23 id. 628; *Crain v. Crain*, 17 Tex. 8; 21 id. 790; *Millican v. Millican*, 24 id. 426; *Gage v. Gage*, 12 N. H. 371; *Allison v. Allison*, 4 Hawks [N. C.] 141;

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Ritter's Appeal, 59 Pa. St. 9; *Stevenson v. Huddleston*, 13 B. Mon. 299; *Edwards v. Smith*, 35 Miss. 197; *Hall v. Burkham*, 59 Ala. 349; *Hart v. Rust*, 46 Tex. 556; *Habergham v. Vincent*, 2 Ves. Jr. 204.) Although a testator, through want of information or for other reasons, prepare his will similar to a deed, as if he seal it, which is not essential to the will, or if it, in other particulars, resembles a deed, it is not in any particular of the same nature as a deed, and will have no validity. (1 Jarman on Wills, 35, note; *Platt v. McCullough*, 1 McLean, 69; *Avery v. Pixley*, 4 Mass. 460; *Williams v. Burnett*, Wright, 53; *Padfield v. Padfield*, 72 Ill. 322.) Eliza F. Wuesthoff was not authorized to receive payment of the policy. (N. J. Rev. Stat. 374, § 1; N. J. Rev. Stat. 1877, p. 762, § 48; Same in Revision, 1846, tit. 9, chap. 2, § 1; N. J. Revision of 1877, §§ 760, 42; *In re Sackett*, 1 Tucker, 84; Schouler on Dom. Rel. [3d ed.] § 299; *In re Prot. E. School*, 47 N. Y. 561; *King v. Londale*, 2 Burr, 477; Code Civ. Pro. § 2838; 2 Rev. Stat. chap. 8, tit. 3, § 38; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Williams v. Stows*, 6 id. 353; *McLockley v. Reid*, 4 Brad. 334; *Hatchett v. Birney*, 65 Ala. 39; *Sherman v. Wright*, 49 N. Y. 227; *People v. Smith*, 43 Ill. 219; *Graves v. Am. Ex. Bk.*, 17 N. Y. 205; *Robinson v. Weeks*, 6 How. Pr. 161; *Southwestern R. R. Co. v. Chapman*, 46 Ga. 538; *McCarthy v. Roundtree*, 19 Mo. 345; *Wadsworth v. Connell*, 104 Ill. 369.) The defendant should pay not only principal, but also interest thereon from the day the payment became due. (*Harris v. Mulock*, 9 How. Pr. 405; *Sanders v. Norton*, 4 J. B. Marshall [Ky.] 464; *Loder v. Hatfield*, 71 N. Y. 105; *Marsh v. Hague*, 1 Edw. Ch. 188; *Palmer v. Trevor*, 1 Vt. 261; *Snell v. Dee*, 2 Salk. 415; *Davis v. Crandall*, 101 N. Y. 311; Park on Ins. 429; Angel on F. & L. Ins. 336; Kent's Com. 438; Marshall Ins. 767; Hughes Ins. 497; Reynolds L. Ins. 34; Bunyon L. Assur. 2; Bliss on Life Ins. § 433; Ellis on F. & L. Ins. 152, note; Reynolds L. Ins. chap. 10; *Dana v. Fiedler*, 12 N. Y. 40; *Adams v. Fort Plain Bank*, 36 id. 255; *Roberts v. Willis*, 1 Spencer, Ch. [N. J.] 602; *In re N. Y.*

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Prot. E. P. School, 47 N. Y. 556.) The rule in New Jersey, as in New York, is that every statute should be so constructed as to suppress the mischief and advance the remedy. (*Smith v. Tucker*, 2 Harr. [N. J.] 82, 84; *Randolph v. Larned*, 12 C. E. Green [N. J.], 557; *Juliand v. Rathbone*, 39 N. Y. 369.)

Edward Salomon for respondent. The complaint was properly dismissed, because no notice and proof of death were ever given to the defendant by the plaintiffs or in their behalf, except those of Eliza F. Wuesthoff, as their guardian, whose action as such they seek to repudiate. (Paley on Agency, Lloyd, 171, 172 [343-346]; *Fisher v. Cuthell*, 5 East, 49; *Cole v. Ball*, 1 Camp. 478; *Coore v. Calloway*, 1 Esp. 115; *Freeman v. Boynton*, 7 Mass. 483; *Bk. of Utica v. Smith*, 18 Johns. 230; *Bliss v. Cottle*, 32 Barb. 322, 325, 326, 327; Story on Agency, §§ 250, 251a; *Hamlin v. Sears*, 82 N. Y. 331; *Farmers Loan & Trust Co. v. Walworth*, 1 id. 433; May on Ins. §§ 463, 465; *O'Reilly v. Guardian Mut. Ins. Co.*, 60 N. Y. 172; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 17 id. 433.) The complaint was properly dismissed, because, except Mrs. Wuesthoff, no general guardian of the plaintiffs, or any guardian authorized to receive payment of the policy, has ever existed. (Revision of N. J. 759, § 36; Code Civ. Pro. §§ 2822, 2823, 2825, 2826, 2827, 2838, 2839, 2840; *Bogardus v. N. Y. Life Ins. Co.*, 101 N. Y. 328; *Segelken v. Meyer*, 94 id. 473; 1 Bliss Code, 220, 234; *Pierce v. Hitchcock*, 2 N. Y. 388; *Finslar v. Malkin*, 12 N. Y. Week. Dig. 530; *Jones v. Felch*, 3 Bosw. 63; Code, §§ 446, 448.) Eliza F. Wuesthoff, considered as a testamentary guardian under the laws of New Jersey, was authorized to receive payment of this policy. (18 How. 104; 9 Wall. 741; 20 N. Y. 103; 56 Ala. 312; Revision of N. J. 464, § 1; p. 1247, § 22; p. 755, § 14; p. 783, § 136; *Swords v. Owen*, 43 How. Pr. 176.) The will of Frederick Wuesthoff may be considered as, and was in fact, also "his deed, executed in his lifetime," disposing of the custody and tuition of his children during their minority; and, therefore, no acceptance in the

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Orphan's Court or security was required of Mrs. Wuesthoff. (Revision of N. J. 464, § 1, and p. 762, § 48; Co. Litt. 171; 2 Black. Com. [Sharswood's ed.] 294, 308, and notes; 4 Kent's Com. 450, 455; *Souwerby v. Arden*, 1 Johns. Ch. 240; *Scrugham v. Wood*, 15 Wend. 545; *Diets v. Farish*, 44 Super. Ct. 190.) There is no inconsistency or incongruity in treating this will of Frederick Weusthoff as his deed also, so far as the appointment of a guardian for his children is concerned. (*Ex parte Earl of Ilchester*, 7 Vesey, 367; *Earl of Shaftsbury v. Lady Hannam*, Finch's Rep'ts, 323; 2 Kents Com. 225; MacPherson on Infants, 81; Schouler's Dom. Rel. 393, 394: *Doe v. Cross*, 8 Q. B. [Ad. & E.] 714; *Robinson v. Schly*, 6 Ga. 515; *Taylor v. Kelly*, 31 Ala. 59; *Kinnebrew v. Kinnebrew*, 35 id. 628; Revision of N. J. 151, 155, 159, 1279.)

Wm. B. Hornblower for respondent, the New York Life Insurance Company. The statute of New Jersey as to declaring acceptance and giving a bond before the testamentary guardian acts as such, is directory and not mandatory. (Sedgwick on Stat. Const. [2d ed.] 316; *In re N. Y. Prot. E. School*, 47 N. Y. 556; 1 R. S. 604, § 7; *In re D. & H. R. Co.*, 19 Wend. 135, 143; *In re Douglass*, 58 Barb. 174; *Rex v. Inhab. of Birmingham*, 8 B. & C. 29, 35; *Cole v Green*, 6 Man. & G. 872, 890; *Rex v. The Justices of Leicester*, 7 B. & C. 6; 9 D. & R. 772.) The steps in the Orphan's Court are but formal acts required by the statute as directory and not essential to the vesting in the guardian. (*In re Van Houton*, 2 Green, 220; 2 Kent's Com. 225; Williams on Exrs. [6th Am. ed.] 293, 302; Schuyler on Admrs. § 194.) The position of the testamentary guardian before giving bond is analogous to that of an assignee for the benefit of creditors under our general assignment act before giving bond. His title vests immediately on the execution of the instrument and even before its recording in accordance with the statute. (Bishop on Debt, § 264, 266.) The laws of New York and not the laws of New Jersey apply in this case.

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(2 Kent's Com. 225; *Woodworth v. Spring*, 4 Allen, 321, 324; Story's Conf. Laws. § 499; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Johnson v. Beattie*, 10 Cl. & Fin. 42, 113, 145; Story's Conf. Laws [8th ed.] § 504a; *Hoyt v. Sprague*, 103 U. S. 613; *In re Hubbard*, 82 N. Y. 90; *Kraft v. Wickey*, 4 Gill & J. 322, 331.

ANDREWS, J. Two questions are presented, *first*, as to the validity of the payment made December 19, 1877, by the defendant to Eliza F. Wuesthoff, the testamentary guardian of the plaintiffs, of the amount of the policy on the life of their father, Frederick Wuesthoff, and *second*, assuming that such payment was not a valid discharge of defendant's obligation under the policy, whether the plaintiffs can now maintain an action to enforce the defendant's liability.

The policy provides that in case of the death of the mother of the plaintiffs before the death of Frederick Wuesthoff, the insurance upon his death "shall be payable to her children for their use, or to their guardian if under age, payment to be made in sixty days after due notice and proof of the death of the said Frederick Wuesthoff." Frederick Wuesthoff died at Newark, New Jersey, August 28, 1877. He resided there in 1864, when the policy was issued and continued to reside there until his death. The policy recites his residence at that place. His first wife, the mother of the plaintiffs, died in 1870. He remarried and by his will executed under seal August 16, 1877, which was duly proved and recorded in New Jersey, he devised all his real and personal property to Eliza F. Wuesthoff, his wife by his second marriage, and appointed her sole executrix of his will, and also the guardian of his three infant children (the plaintiffs), the eldest being then of the age of about sixteen years. On the 14th of September, 1877, Eliza F. Wuesthoff, as guardian, served on the defendant notice and proof of death of Frederick Wuesthoff, stating the date and place of his death, and that she as guardian for the children was the legal owner of the policy. Upon the request of the company she also furnished proof of the death of Amalie

Wuesthoff, the wife of Frederick Wuesthoff by his first marriage, and the names and ages of her children, and also delivered to the company a certified copy of the will. Thereafter, December 19, 1887, the defendant paid to Eliza F. Wuesthoff \$5,000, the full amount of the policy, taking her receipt as guardian. Eliza F. Wuesthoff, after the death of her husband, qualified as executrix of the will and assumed the administration of his estate, but she never formally signified her acceptance of the office of guardian or gave a guardian's bond.

There can, we suppose, be no doubt that the plaintiffs were the persons who, by the contract of insurance, in the situation existing at the time of the death of Frederick Wuesthoff, were entitled to the benefit of the insurance. They were the legal beneficiaries of the fund. The contract of the defendant was in legal effect a contract to pay to the plaintiffs in the contingency which happened, and the clause providing that payment should be made to "their guardian, if under age," did not change the force or effect of the obligation. It expressed in terms what in the absence of express words would be the legal consequence that an obligation for the payment of money to infants, may be discharged by payment to a guardian. The qualification that the guardian must be duly authorized to receive the payment is implied. It would be contrary to the nature and object of the contract to construe it as authorizing payment of a debt due to infants to be made to a person who although he might in a formal or even in a legal sense be a guardian, nevertheless had no authority as such to collect or receive the money or debts due to the ward. We think it cannot be questioned that the contract to pay the guardian of the infant beneficiaries, means a guardian legally authorized to receive and discharge the debt, and that a guardian possessing this authority, whether a general or chancery guardian, a testamentary guardian or a guardian *ad litem*, is, within the meaning of the policy, a guardian to whom payment could be lawfully made. The payment upon which the defendant relies was made to a testamentary guardian.

The power of a father to appoint a guardian by deed or will was originally given by statute (12 Chas. II), which has been re-enacted in most of the States and extended in some of them so as to embrace the mother. The power to appoint by deed is construed as meaning a testamentary instrument in the form of a deed, to operate only after the death of the parent. (2 Kent's Com. 225.) But the power is statutory and does not exist in the absence of a statute conferring it. The power of a testamentary guardian, when not restricted, extends to the control of the person of the ward and the custody and management of her real and personal property. (*Chapman v. Tibbits*, 33 N. Y. 289.) But as the right to appoint a testamentary guardian depends on statute, it follows that the whole subject is within the control of the legislature, and that it may not only regulate and restrict the power of appointment, but may define, limit and regulate the authority of the guardian and prescribe the conditions under which the authority shall be exercised. The statute of New Jersey in force August 16, 1877, provides that the father may, by his deed executed in his lifetime, or by his last will and testament in writing, dispose of the custody and tuition of his minor child or children during their minority, and that the person or persons to whom the custody of such child or children may be given, shall and may (among other things) "take into his, her or their custody for the use of such child or children the profits of all lands, tenements or hereditaments of such child or children, and also the custody and management of the goods, chattels and personal estate of such child or children till his or her, or their respective age of twenty-one years, and may bring such action or actions in relation thereto as by law a guardian in socage might do." (Revision of New Jersey Statutes, 664, § 1.) By another section it is provided that: "Every guardian appointed by last will or testament, which shall be legally proved and recorded, shall before he exercises any authority over the minor or his estate, appear before the Orphan's Court and declare his acceptance of the guardianship, which shall be recorded, and shall give bond with such

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sureties and in such sum as the said court may approve of and order, for the faithful execution of his office, unless it is otherwise directed by the testator's will." (Page 762, § 48.) The will of Frederick Wuesthoff gave no direction on the subject, and it is conceded that Eliza F. Wuesthoff, the guardian, had not at the time of receiving payment on the policy, declared her acceptance of the guardianship, as required in this section, nor had she given any bond or security as guardian, and that no bond or security has ever been given.

It is insisted in behalf of the defendant that the authority of the guardian under the New Jersey statute is derived from the will or deed appointing her, and that by force of the will and the section of the statute first cited, Eliza F. Wuesthoff, immediately on the death of her husband, was vested with the character of guardian, or at least she became such on assuming to act as guardian and could without further qualification lawfully receive and discharge the debt owing by the defendant. This contention wholly ignores section 48 as a limitation upon the powers of a testamentary guardian, which requires the guardian to declare his acceptance of the guardianship in the Orphan's Court and the execution of a guardian's bond "before he exercises any authority" over the person or estate of the minor. Section 48, it is claimed, is directory merely, and a compliance with its provisions, it is insisted, is not a condition precedent to the right of a guardian to collect and discharge a debt due to the ward. The distinction which in the construction of statutes is sometimes made between directory and mandatory provisions, proceeds upon the supposed intention of the legislature, and a discrimination between the essential and the immaterial or non-essential provisions of the statute, or where the statute relates to the powers and duties of officers, between those parts which are intended as a mere direction to the officer in the execution of his duties and those which relate to and concern his substantial authority. The exercise by courts of a power to disregard a particular provision of a statute on the ground that it is directory merely, is a delicate one and should be applied with

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great caution. The intention of the legislature is the cardinal consideration in the construction of statutes, and whether a particular provision is mandatory or directory is to be determined from the language used and the purpose in view. Construing the various sections of the New Jersey statute together, it is plain, we think, that the first section quoted was intended to define the general powers of a testamentary guardian, and that section 48 was intended to prohibit and suspend the exercise by a testamentary guardian of the functions of his office until he should signify his acceptance of the office and execute the bond required. Obviously the object of the legislature in requiring the guardian to give security, was the protection of the ward. The legislature was dealing with the interests of a class especially entitled to the protection of the law. It was a wise safeguard to require that a guardian, before intermeddling with the estate of the ward, should give security for its faithful administration, unless the parent dispensed with this precaution. It is impossible to suppose that the legislature, in enacting section 48, intended simply to impose upon the guardian the duty of giving security and not to make the duty imperative. This section is to be construed as if written in the prior section, and so read it makes the giving of security a necessary qualification and a prerequisite to the exercise of any authority over the estate of the ward.

But it is insisted that the capacity of the guardian, Eliza F. Wuesthoff, to collect and discharge the debt owing by the defendant, is to be measured and determined by the powers of testamentary guardians appointed under the law of New York, the domicile of the debtor, and the place where the policy was issued and where the debt was paid. The law of this State, as it stood in 1877, at the time of the death of the insured and of the payment of the policy, authorized a father, by deed or last will, to dispose of the custody of his infant child during his minority, and declared that every such disposition from the time it takes effect, shall vest in the person so appointed all the rights and powers

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of a guardian, with the right to the custody and management of the personal estate of the ward. (1 R. S., 150, chap. 8, tit. 3, §§ 1, 2, 3.) No formality was required to complete the title of the guardian, nor was he required to give any security. It is doubtless true that if this had been the case of a domestic testamentary guardianship, the payment made by the defendant would have been authorized. But the New York statute relates exclusively to domiciliary guardianships under wills or deeds of residents of this jurisdiction. The defendant cannot invoke the statute defining the powers of domestic guardians to justify a payment to a guardian appointed under a foreign jurisdiction, who by the laws of the sovereignty appointing him, was not authorized to receive it. The general rule is well settled that "a guardian appointed by virtue of the statute of another State, cannot exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the jurisdiction of the government which clothed him with his office." (*Woodworth v. Spring*, 4 Allen 321; *Morrell v. Dickey*, 1 J. Ch. 153; Story Con. Laws, § 499.) A debtor in this State may pay a foreign guardian, and the payment will be a good discharge if the guardian, by the law of the State from which he derives his appointment, is authorized to receive it. (*Parsons v. Lyman*, 20 N. Y. 103.) The defendant when the payment was made was informed that the deceased was a resident of New Jersey at the time of his death, and that Eliza F. Wuesthoff was a testamentary guardian appointed in and under the laws of that state, and the defendant was chargeable with notice that the powers of the guardian were regulated by and depended upon the law of the domicile of the plaintiffs. The payment was at the peril of the defendant. The further claim that the appointment of Eliza F. Wuesthoff was by deed and not by will, and therefore that the case is not within section 48, which relates to a guardian appointed "by last will and testament," is, we think, untenable. The claim is based upon the fact that the will of Frederick Wuesthoff is a sealed instrument. It is conceded that if the seal had been

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omitted the appointment would have been by will, and so within section 48. But the intention that the instrument should operate as a will, and that it was not delivered as a deed, is conclusively established. It recites that it was a will. It was executed a few days before the testator's death. It was left for safekeeping with the physician in whose office it was drawn. The unnecessary addition of a seal does not change the essential character of the instrument or justify treating it as in part a will and in part a deed.

The second general question relates to the remedy. The policy is payable "sixty days after due notice and proof of the death." It is urged that as no notice or proof of death was furnished, except what was given by the guardian, the plaintiffs by repudiating her act in receiving payment, also, as a consequence, repudiates her act in giving notice of proof of death, so that they are left without any proof in the case of the performance of this precedent condition to maintaining the action. It is, we think, a sufficient answer to this proposition that while Eliza F. Wuesthoff was not, by the appointment in the will and the death of her husband, invested with any power to interfere with the infants' estate before giving security, she nevertheless was nominally the guardian of the children, and as such had sufficient authority to justify her taking a step in the interest of the children, designed merely to accelerate the maturing of the claim on the policy, and that the company having accepted and acted upon the notice without objection cannot now question its sufficiency.

The answer to the further point that there must be some person in existence authorized to receive payment, before the company is liable, has already been indicated. The guardian *ad litem* is a guardian within the meaning of the policy. He is authorized to represent the infants in collecting the claim, and payment by the defendant in this action will be a full discharge of its obligation.

We are constrained for the reasons stated to reverse the judgment below. It seems a hard case. The defendant on a new trial may be able to show that the money paid to the

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guardian has been applied in whole on part to their benefit and support of the infants, under circumstances which entitle the defendant to an equitable counter-claim.

The judgment should be reversed, and a new trial granted.
All concur.

Judgment reversed.

THE PEOPLE ex rel. THE NEW YORK ELECTRIC LINES COMPANY, Appellant, v. ROLLIN M. SQUIRE, as Commissioner, Respondent.

The act of 1885 (Chap. 499, Laws of 1885), entitled "an act providing for placing electrical conductors under ground in cities of this state and for commissioners of electrical subways" is not violative of the provision of the State Constitution (Art. 3, § 16), declaring that no local or private bill shall embrace more than one subject, and that shall be expressed in the title. Said act is not a local or private bill within the meaning of the constitutional provision, and it embraces but one subject which is fairly expressed in the title.

A law, general in its terms, regulating the operation of all corporations of a certain kind in cities of a certain class is not made a local or private bill by the fact that such companies are all located in, or that the specified class of cities include but one or a limited number of the cities of the state.

The fact that said act (§ 2) charges the board of commissioners of electrical subways, thereby directed to be appointed, with the duty of enforcing the provisions of the act of 1884 (Chap. 534, Laws of 1884), and declares that the said act of 1884 is thereby amended so as to conform to the provisions of the act of 1885, does not render the latter act obnoxious to the constitutional provision (Art. 3, § 17), declaring that no act shall be passed providing that any existing law shall be deemed part thereof or applicable thereto, "except by inserting it in such act."

The fact that said act of 1885 directs that the costs and expenses of each board of commissioners appointed under it shall be assessed upon the companies "operating electrical conductors in the city," does not render the act void as imposing a tax upon the companies specified without consent, hearing or benefit, in violation of the Constitution. (Art. 1, § 6.) No tax is imposed within the meaning of the Constitution.

It seems that, conceding said provision in relation to assessments does impose a tax, it does not necessarily invalidate the other provisions of the statute.

The said act of 1885, so far as it affects corporations organized before its passage, is not obnoxious to the constitutional prohibition against laws

107	593
135	661
107	593
135	290
107	593
137	12

107	593
189	514
107	593
144	407

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160	396

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impairing the obligations of contracts; it does not annul, destroy, or materially impair or restrict any franchises or contract rights previously secured, but seeks to regulate and control their exercise, so that they shall cease to constitute a public nuisance.

Regulations of the character provided for in said acts are strictly police regulations, such as are within the legitimate authority of the legislature to delegate the exercise thereof to municipal corporations.

The right to exercise this police power is a governmental function which cannot be alienated, surrendered or abridged by the legislature by any grant, contract or delegation whatsoever.

The relator was incorporated under the general act of 1848 (Chap. 265, Laws of 1848), for the purpose of constructing and maintaining electric conductors to be placed under the streets in the city of New York. It received from the common council of the said city, by virtue of the power conferred on that body by the act of 1879 (Chap. 897, Laws of 1879), permission to construct conduits and lay wires in certain streets, the work to be done under the supervision of the commissioner of public works. In 1883 the relator filed with the county clerk certain maps, etc., as required by the ordinance, and in 1886 made application to the department of public works for permission to make excavations in certain streets in order to lay its wires and conductors, which was refused on the ground that the relator had not obtained the approval of the subway commissioners appointed pursuant to said act of 1885, as required by said act. In proceedings to obtain a peremptory *mandamus* requiring said commissioners to grant the permit, *held*, that the application for the writ was properly denied.

(Submitted November 29, 1887; decided January 17, 1888.)

APPEAL from order of the General Term of the Court of Common Pleas, in and for the city and county of New York, made February 7, 1887, which affirmed an order of Special Term, denying an application for a peremptory *mandamus* directing defendant, as commissioner of public works in and for the city of New York, to grant to the petitioner a written permit to make excavations in certain streets of the city of New York "for the purpose of laying the wires on their conductors of electricity."

The material facts are stated in the opinion.

David Leventritt for appellant. The subway act of June 13, 1885, as amended by chapter 503 Laws of 1886, is a local bill and violates section 16, article 3 of the Constitution of

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this state. (*People ex rel. v. Albertson*, 55 N. Y. 55; *Ohio ex rel. v. Covington*, 29 Ohio, 110; *Dist. Court Case*, 34 Ohio, 441; *People ex rel. v. Allen*, 42 N. Y. 404; *Devine v. Com'rs, etc.*, 84 Ill. 590; *State ex rel. v. The Judges*, 21 Ohio, 11; 31 id. 607; *People v. Hills*, 35 N. Y. 449.) These acts of 1885 and 1886 are unconstitutional, because they levy a tax upon telegraph companies without equality and without consent, hearing or benefit. (*Embury v. Conner*, 3 N. Y. 511; *Stuart v. Palmer*, 74 id. 183; *Sullivan v. City of Oneida*, 61 Ill. 248; Const. art. 1, §§ 6, 9; U. S. Const, 14th amd't; *People ex rel. v. Hayden*, 50 N. Y. 530, 533; 82 id. 196; *People ex rel. v. B'd Suprs. Kings Co.*, 52 id. 556.) By its incorporation under the acts of the legislature, particularly chapter 397 of the Laws of 1879, and its further contract with the city, the relator acquired vested rights before the passage of the subway act of 1885. (*Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 N. Y. 91; *Fletcher v. Peck*, 6 Cranch, 87; *Dart. Col. v. Woodward*, 4 Wheat. 518; *Green v. Beddle*, 8 id. 2; *Gordon v. The Appeal Tax Const.*, 3 How. [U. S.]; *Orleans v. Lottery Co.*, 119 U. S. 265.) The relator's contract with the city was complete upon its acceptance of the franchise to lay underground conductors and binding itself to the conditions, restrictions on payments there agreed to. (*Coleman v. Eyre*, 45 N. Y. 39; Story on Con. § 568; Pollock on Con. [Wald's] 176; *Ches. & O. C. Co., etc. v. B. & O. R. R. Co.*, 4 Gill & J. [Md.] 1, 144, 150; *Edgeware Highway Board v. Harrow Gas Co.*, L. R. 10 Q. B. 92; *Milhan v. Sharp*, 27 N. Y. 611; Dillon on Corp. [3d ed.] § 308; *People v. Sturtevant*, 9 N. Y. 273; *Mayor, etc., v. Second Ave. R. R. Co.*, 32 id. 261; *Brooklyn v. City R. R. Co.*, 47 id. 476; *Matthew's Admrs. v. Meek*, 23 Ohio, 292; *Philpot v. Guninger*, 14 Wall. 570; *Pac. R. R. Co. v. Leavenworth City*, 1 Dillon, 393.) The legislature, by the subway act of 1885, did not intend to make it retroactive so as to apply to affect the relator's vested rights. (*Murray v. N. Y. C. R. R. Co.*, 3 Abb. [Ct. Ap.] 341; *Tracy v. Troy & B. R. R. Co.*, 38 N. Y. 433; *Farmers' Bank v. Hale*, 59

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id 53; *Dask v. Van Kleeck*, 7 John. 477; *Johnson v. Burrill*, 2 Hill, 238; *Butler v. Palmer*, 1 id. 325; *McMannis v. Butler*, 49 Barb. 585; *Ganson v. City of Buffalo*, 1 Keyes, 460; *Berley v. Rampacker*, 5 Duer, 188; *Conway v. Cable*, 37 Illinois, 82; *Deininger v. McConnell*, 41 id. 228; *Peop'e ex rel. v. Palmer*, 52 N. Y. 84; *U. S. v. Central P. R. R. Co.*, 118 U. S. 235; *Sinking Fund Cases*, 99 id. 700; *Close v. Glenwood Cemetery*, 107 id. 466.) If the legislature intended to apply the act of 1885 to the relator, said act is to that extent unconstitutional as impairing the obligation of contracts prohibited by the Constitution of the United States. (*Donalds v. State of New York*, 86 N. Y. 36; *Chenango Bridge Co. v. Binghamton Bridge Co.*, 27 id. 87; *Woolever v. Stewart*, 36 Ohio, 146; *Hunter v. Hatch*, 45 Ill. 184; *Parmlee v. Lawrence*, 44 id. 406; *People v. Secretary of State*, 58 id. 90; *People ex rel. v. Otis*, 90 N. Y. 48; *Ogden v. Saunders*, 12 Wheat. 256; *New Orleans v. Louisiana Lottery Co.*, U. S. Sup. Ct. Dec. 6; *Matter Cable R. Co.*, 104 N. Y. 1; *Broadway R. R. Case*, Alb. Special Term Dec. 23, 1886; *Bronson v. Kinsey*, 1 How. [U. S.] 317, 318; *Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122; *Robinson v. Magee*, 9 Cal. 81; *McCracken v. Haywood*, 2 How. [U. S.] 614; *McCauley v. Brooks*, 16 Cal. 37.) The police power does not and was not intended by the legislature, under the subway act of 1885, to apply to underground wires, but to the nuisance, obstruction and danger of existing poles and wires overhead. (*Chy Lung v. Freeman*, 92 U. S. 275; *Morgan v. La.*, 118 U. S. 455; *Gibbons v. Ogden*, 9 Wheat. 210; *Soon Hing v. Crowley*, 113 U. S. 703; *N. O. Gas Co. v. Louisiana Light Co.*, 115 U. S. 661, 674; *Wynehamer v. People*, 13 N. Y. 378; *State v. Walruff*, 26 Fed. Rep. 178; *Mahin v. Pfeiffer*, 27 id. 892; *People v. Platt*, 17 Johns. 195; *People v. Jacobs*, 98 N. Y. 99, 107.) The relator's work and business, and the means and manner of carrying it forward, not being a nuisance in itself, nor of such a nature as to create a nuisance, the right to its property and franchise privileges, and the pursuit of its business is funda-

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mental. (Const. art. 1, § 6; *Fick Wo v. Hopkins*, 118 U. S. 370; *Ex parte Virginia*, 100 id. 339; *Live Stock Assn. v. Crescent City*, 1 Abb. [U. S.] 398; *Slaughter House Cases*, 16 Wall. 106; *Carfield v. Caryell* 4 Wash C. C. 380; *Matter of Jacobs*, 98 N. Y. 99; *Bertholf v. O'Reilly*, 74 id. 515; *People v. Marx*, 99 id. 377; *Kessinger v. Hinkhouse*, 27 Fed. Rep. 883.)

D. J. Dean for respondent. The privileges conferred upon the relator by the resolution of the common council are held by it subject to be affected in practice, use or operation, by any necessary police regulation in respect thereto. Such property is held subject to the power of the state to regulate and control its use in the interest of the public welfare. (*Presb. Church v. Mayor. etc.*, 5 Cow. 538; *Britton v. Mayor, etc.*, 21 How. 25; *People v. Morris*, 13 Wend. 325; *Thorp v. R. & B. R. R. Co.*, 77 Vt. 140.) The act of 1885 is not obnoxious to the constitutional objection on the ground that it is a local bill. (*N. Y. El. R. Co.*, 70 N. Y. 327; *In re Church*, 92 id. 1.) If, when any invalid provision of an act is stricken out, that which remains is complete in itself, and is capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the act must be sustained. (*People v. Briggs*, 50 N. Y. 553; *In re Middletown*, 82 id. 196.)

RUGER, Ch. J. The relator was incorporated in 1882 for the purpose of "owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication, and for electric illumination, to be placed under the pavements of the streets," etc., in the counties of New York and Kings. Their organization was effected under chapter 265 of the Laws of 1848, which, by a general law, authorized the formation of corporations of that character, and in 1883 it applied to and received from the common council of the city of New York, by virtue of the power conferred upon such council by chapter

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397 of the Laws of 1879, permission to construct conduits and lay wires in certain streets of New York, under certain conditions named in the ordinances, which, among other things, required that such work should be performed under the control and supervision of the commissioner of public works. The relator, in 1883, also filed with the clerk of New York county certain maps, plans and tabular statements, as required by the ordinance, and proceeded to collect the material and equipments necessary to build its structures and transact its business. No further progress seems to have been made by the relator until July, 1886, when application was made by it, to the department of public works of New York for permission to open some of the streets in the city, for the purpose of laying therein its wires and conductors. This permission was refused upon the ground, that the relator had not obtained the approval of the subway commissioners of New York to its plans and construction.

This proceeding was brought to obtain a peremptory *mandamus* requiring the commissioner of public works, to grant a permit to the relator, authorizing it to excavate in the streets of the city to enable it to construct conduits, and lay electric wires and conductors therein. The application was denied at Special Term, and the General Term, upon appeal to that court, affirmed the order denying the writ. Section 1 of chapter 534 of the Laws of 1884, provides that "all telegraph, telephonic and electric light wires and cables used in any incorporated city of this State, having a population of five hundred thousand or over, shall hereafter be placed under the surface of the streets, lanes and avenues of said city." Section 2 requires that "every corporation * * * owning or controlling telegraph, telephone, electric or other wires or cables * * * shall before the 1st day of November, 1885, have the same removed from the surface of all streets or avenues in every such city of this state;" and section 3 provides that in case the owners of such property do not comply with the provisions of the act within the time limited, the local governments of the said cities shall cause such wires, etc., to be

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removed and placed under ground. These provisions do not seem to have been impaired in any material respect by the subsequent legislation of 1885 and 1886, and by express terms the act applies as well to existing companies, as those thereafter to be formed.

By chapter 499, Laws of 1885, it was provided that three persons should be appointed to constitute a board of commissioners of electrical subways in cities having a population exceeding five hundred thousand. By section 2, such boards were charged with the responsibility of enforcing the provisions of the act of 1884, and it was made their duty to cause to be removed from the surface of the streets, etc., all wires and cables used in the business of such electric companies and to put them under ground, wherever practicable, and cause them to be there operated and maintained, and said act of 1884 was declared to be amended to conform to the provisions of this act. Section 3 of said act provided that "when any company operating or intending to operate electrical conductors in any such city, shall desire or be required to place its conductors or any of them underground * * * it shall be obligatory upon such corporation to file with said board of commissioners, a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimensions and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed it shall be necessary to obtain the approval of said board, of said plan of construction so proposed by such company." By section 10 "all acts and parts of acts inconsistent herewith are hereby repealed."

These acts seem to have been intended to apply to all companies, and to whatever stage of their organization they may have reached. It is not claimed by the relator that it has ever filed with the board of commissioners its maps and plans as required by said act, or that it has obtained from them an approval of such maps, etc., and it is therefore clear that section 3 of the act of 1885 constitutes an insuperable objection to the relator's application, unless for some reason it be adjudged to be void for unconstitutionality.

The relator has met this question squarely, and challenges the constitutionality of the act upon several grounds, which may be summarized as follows :

1st. That it violates section 16 of article 3, in that it is a local bill and embraces more than one subject, not expressed in its title.

2d. That it violates section 17 of article 3, providing that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable except by inserting it in such act."

3d. That said act levies a tax upon such companies, in that it is provided that the cost and expenses of such board of commissioners are authorized to be assessed by the comptroller of the state, when paid by him, upon the several companies operating electrical conductors in any such city of the state, which shall be required to place and operate its conductors underground.

4th. That if said act of 1885 applied to the relator, it was unconstitutional, as it impaired the rights which it had secured by virtue of the grant, from the authorities of New York to construct conduits and lay wires and conductors in the streets of that city, and its acceptance thereof.

We are of the opinion that none of the points taken by the appellant are tenable. It is convenient to consider these questions in the order in which they have been stated :

First. The act referred to is not subject to the condemnation expressed in section 16, article 3, for the reason that it is neither a private or local bill, nor does it embrace more than one subject. The three acts of 1884, 1885 and 1886 all relate to the same subject, viz., that of placing all electrical wires and conductors in cities exceeding five hundred thousand population, under the surface of streets, etc., subject to the control of the local authorities ; and no provision is incorporated in either of these acts which is not strictly incidental to the general object intended to be accomplished. They relate simply

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to the mode and manner, in which the provisions of the several acts in relation to the location and removal of electrical wires and conductors shall be applied and enforced, and constitute but one subject of legislation.

Neither is the act a local or private one within the meaning of the section referred to. Such was the decision of this court. (*In the Matter of the N. Y. El. R. R. Co.*, 70 N. Y., 327, and *In the Matter of Church*, 92 N. Y., 1.) This act is general in its terms, applying to all cities in the state, of a certain class and to every corporation, carrying on a business requiring the use of electrical wires or conductors in such cities. That the number of such cities is limited or restricted, does not make the bill a private or local one, within the constitutional meaning and intent of these words, was expressly decided in the cases referred to.

How many companies there are to which this bill applies we have no means of determining, but the fact that a general law is passed regulating the operations of all such companies, in cities of the class referred to, does not constitute it a private or local bill, although it may happen that such companies are all located in one or more cities of the state.

Second. Neither do we think the act obnoxious to the objection that it incorporates in its provisions a prior act without inserting such act therein. The act is neither within the letter or spirit of the constitutional provision. There was no attempt to re-enact the law of 1884 by the law of 1885. The act of 1884 was a law by the force of its own enactment and so continues. It has never been repealed or re-enacted. The act of 1885 treats that of 1884 as a valid and existing law, and purports simply to provide methods, by which it may be more conveniently carried out and enforced. It might be better, perhaps, to have all laws relating to this subject incorporated in a single act, but I apprehend it is no objection to a law, under the Constitution, that other laws on the same subject exist in other volumes of the statutes, or that the arrangement and location of such laws are faulty, or perhaps intricate and awkward, or involve labor and trouble to determine what

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in fact the law is. The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it, to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended. It must be presumed that the legislature is informed of the condition of a law which it is called upon to amend. It could never have been contemplated by the framers of the Constitution that any legislator would remain ignorant of the provisions of a law which it was proposed to change, or would require the provisions of such a law to be transcribed into the proposed legislation to enable him to act upon it judicious and intelligently. Such a construction would lead to innumerable repetitions of laws in the statute books and render them not only bulky and cumbersome, but confused and unintelligible almost beyond conception.

Third. The claim that this law is void because it imposes a tax on the companies referred to, cannot be maintained. The act of 1884 imposes the duty upon such companies to remove and cause to be laid underground, all such wires and cables as are required in their business, and there is no reason why such companies should not be subjected to the payment of all expenses, incurred in the construction of works required to carry on their own business.

This question has received a practical construction in the legislation of the state by its laws imposing upon banking and insurance corporations the expenses incurred by the government in the management and regulation of such institutions and their business operations. It has never been supposed that these laws imposed a tax within the meaning of the Constitution. A further answer to this point is found in the circumstance that even if it be admitted that the law does

impose a tax, it does not necessarily invalidate the other provisions of the statute. The comptroller of the state is required to pay these expenses in the first instance, and no question arises over the liability of the companies until they are called upon, by the comptroller, to refund to him the amount of such expenses. This provision of the statute may be eliminated from it without impairing in the least the general scheme of the act, and upon well settled principles when this can be done, it affects so much of the act only, as may be declared unconstitutional.

Fourth. The relator also claims that the act is obnoxious to the clause of the Constitution which forbids the enactment of any law impairing the obligation of contracts. It may be said in reference to this claim that the contract itself provides that the work of removal and replacement and of making excavations in the streets, avenues, etc., of the city by any telegraph company for the purpose of laying its wires, shall be subject to the control and supervision of the commissioners of public works, and such commissioners might well require, in the exercise of their discretion, that the locality, time, mode and manner of performing such work should be approved by the officers having the general supervision of that subject in the city, before authorizing a single company, among the many claiming such privileges, to tear up its streets and construct trenches through its various thoroughfares and avenues, at their own will and pleasure.

But we are of the opinion, for other reasons, that this legislation did not and was not intended to materially impair or restrict the enjoyment of the franchise secured by the relator. The necessity of these acts sprung out of a great evil, which, in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation not only of the surface and air above the streets, but indefinite space under ground.

This evil had become so great that every large city was covered with a net work of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public. Extensive spaces under ground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision, to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt and it finally culminated in the enactment of the several statutes referred to.

These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed underground in such cities, and be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.

That regulations of the character provided for in these acts are strictly police regulations, and such as no chartered rights can nullify or override, is too clear to admit of dispute. The primary and fundamental object of all public highways is to furnish a passage-way for travelers in vehicles, or on foot, through the country. (Bouvier's Institutes, § 442.) They were originally designed for the use of travelers alone.

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But in the course of time and in the interest of the general prosperity and comfort of the public they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. Thus they have been appropriated in recent times for the reception of sewers, water pipes, gas pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone and other purposes, which all require in their construction the disruption of the pavements and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities, would seem imperatively to require the creation of a neutral board, with controlling authority, to form a comprehensive plan by which these various enterprises may be harmonized and carried on without detriment to each other, and with due regard to the rights of the public. Such power is pre-eminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations.

An elementary writer has said that "the police of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." (Cooley on Const. Limitations, 572.)

Justice SHAW said, in *Commonwealth v. Alger* (7 Cush. 84) that it was "a well-settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the rights of the community. All property

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in this commonwealth * * * is held subject to those general regulations, which are necessary to the common good and general welfare."

Ch. J. REDFIELD, in *Sharp v. Rutland & Burlington R. R. Co.* (27 Vt. 149), says: "This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state."

The right to exercise this power cannot be alienated, surrendered or abridged by the legislature by any grant, contract or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights which it was especially designed to accomplish. Thus it was held in *Presbyterian Church v. City of New York* (5 Cow. 540), where the corporation had granted, with a covenant for quiet enjoyment, a piece of land to the plaintiff to be used for church purposes and as a cemetery, that the power of the municipal government to pass an ordinance forbidding the use of such premises as a cemetery for the interment of the dead constituted no breach of the covenant. It was said that "the defendants are a corporation, and in that capacity are authorized by their charter and by-laws to purchase and hold, sell and convey real estate in the same manner as individuals. * * *. They are also clothed, as well by their charter as by subsequent statutes of the state, with legislative powers, and in the capacity of a local legislature are particularly charged with the care of the public morals and the public health within their jurisdiction. * * *. They had no power as a party to make a contract which should control or embarrass their legislative powers and duties." To the same effect is *People v. Morris* (13 Wend. 325).

In *Wynehamer v. People* (13 N. Y. 421) Judge Comstock says, in speaking of rights of property: "The substantial right cannot be destroyed; its enjoyment is not an offense. * * *. At the same time the mode of enjoyment in its broadest sense, is subject to legislation, though it be affected very injuriously, provided a substantial right is left.

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The claim made by the relator in this case would authorize it to tear up the streets of the city at such times, in such places and under such circumstances as it might itself determine, regardless of the public convenience and welfare, and the rights of other claimants to the occupation thereof, and place it beyond the reach of all power by the legislature to regulate the mode and manner of the enjoyment of its rights.

We do not think such a claim can be sustained. It is neither within the terms of its contract, and if it were it is still subject, in the respects mentioned, to the police power of the State.

The order of the General Term should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE ex rel. JAMES H. BRESLIN, Respondent, v.
ABRAHAM R. LAWRENCE, Justice of the Supreme Court,
Appellant.

Where, upon hearing on *habeas corpus* before a justice of the Supreme Court, the relator was remanded to custody, and the General Term, on *certiorari*, directed to said justice as such, reversed the order and directed the discharge of the prisoner. *Held*, that said justice was not the proper person to take an appeal to this court; that the decision affected no substantial right of his within the meaning of the Code of Criminal Procedure (§ 519), or of any person of whom he was the legal representative or agent.

It seems the appeal in such case should be taken "in the name of the People" by the attorney general or the district attorney. (Code of Civ. Pro., § 2059.)

(Argued November 29, 1887; decided January 17, 1888.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 24, 1887, which reversed an order of "Hon. ABRAHAM R. LAWRENCE, Justice said Court," the nature of which, as well as the material facts are stated in the opinion.

107	607
110	611
107	607
128	435
107	607
160	212

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Noah Davis for appellant. The appeal was properly taken in the name of the appellant. (*People ex rel. Munsell v. Court of Oyer and Terminer*, 101 N. Y. 245; *People ex rel. N. Y. Society, etc. v. Gilmore*, 88 id. 626; *People ex rel Lawrence v. Grady*, 56 id. 182.)

Robert G. Ingersoll for respondent. The appeal was not properly taken. (Code Crim. Pro., § 519; Code Civ. Pro., §§ 2058, 2059.)

DANFORTH, J. The relator was arrested by virtue of a warrant issued by a police justice in the city of New York, charging the sale of wines and liquors on Sunday in violation of the statute, and after pleading not guilty, was upon *habeas corpus* before Judge LAWRENCE, remanded to custody. On the application of the prisoner the Supreme Court at General Term allowed a writ of *certiorari*, directed "To the Honorable ABRAHAM R. LAWRENCE, a Justice of the Supreme Court of the State of New York," requiring him to return to that court the record of the *habeas corpus* proceedings. He did so, and upon consideration had, the order of Justice LAWRENCE was reversed, and the prisoner ordered to be discharged from custody. A notice was then served upon the relator's attorney, signed "E. Henry Lacombe, counsel to the corporation," and stating that "ABRAHAM R. LAWRENCE, one of the Justices of the Supreme Court, appeals to the Court of Appeals from the order of the General Term," above described. The counsel in support of the appeal in this court also describe themselves as "counsel to the corporation."

We have considered the case with a desire to reach the question which lies at the bottom of the proceedings and by construing the excise act now in force, dispose of a matter of public importance, but the respondent meets the appeal not only on that point, but by very earnest argument insists that the appellant has misconceived the statute by which the jurisdiction of this court is regulated. The argument has not been successfully answered. The appellant claims that the appeal

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can stand upon the authority of section 519 of the Code of Criminal Procedure. This section declares that an appeal may be taken from the judgment of the Supreme Court in the following cases, and no other :

First. From a judgment affirming or reversing a judgment of conviction.

Second. From a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, or an order of the court arresting the judgment.

Third. From a final determination affecting the substantial right of a defendant.

The last subdivision is the one invoked as embracing the case before us. The appellant is ABRAHAM R. LAWRENCE, not as an individual, but in his judicial character as a "justice of the Supreme Court." He was styled defendant in the court below in that character only, and the object of the proceedings in the General Term was to procure a reversal of an order made by him in his judicial capacity. We are unable to discover that he had an interest in maintaining the order, or that it affects any right peculiar to himself. Nor can he be regarded, as the appellant claims, in the light of a representative of parties who may be really interested, and as such "represent the substantial right of all parties who prosecute or defend in his name." We find no provision of law or practice which makes him a vicarious agent or officer. On the contrary, the Code of Civil Procedure (§ 2059), vests that function in other officers by declaring that "an appeal from a final order discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken in the name of the People by the attorney general or the district attorney." This provision took the place of section 70, part 3, chapter 14, title 1, article 2, page 573, Revised Statutes, which made it the duty of the attorney general to prosecute a writ of error to the court for the correction of errors in case of the discharge, by the Supreme Court, of a prisoner from a commitment upon a criminal accusation. Hence the appellant is not only not aggrieved, he is in no sense

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entitled to represent those, if any there are, who have cause to complain of the order made by the Supreme Court.

The learned counsel for the appellant cites in support of the appeal, *People ex rel., etc. v. Gilmore* (88 N. Y. 626). In that case, although the order was not reviewable on its merits, the appeal was entertained because the court below had, without authority, imposed costs upon the relator, and so much of its decision was reversed. In the case before us no costs were imposed by the Supreme Court, and neither in that, nor in the other cases also cited (*Munsell's Cases*, 101 N. Y. 245; *Lawrence Case*, 56 id. 182), was the point now before us presented. Whether it could have been it is unnecessary to inquire.

The objection to the proceeding now before us relates to matter of substance. We think it must prevail, and the appeal be dismissed.

All concur.

Appeal dismissed.

107	610
120	11

ANDREW SMITH, Respondent, v. THE RECTOR, WARDENS AND VESTREYMEN OF ST. PHILIP'S CHURCH OF THE CITY OF NEW YORK, Appellants.

A lease for a term of twenty-three years contained a covenant on the part of the lessee to build on the demised premises within six years from its date a building as specified, and in default of such erection it was declared that the estate granted should cease. If the building should be erected within the time specified and should be standing at the expiration of the term, the lease provided that the lessors would, at their option, either grant a new lease for a further term, or pay the fair value of the dwelling; the rent for the new term or the value of the building to be determined by appraisers, one to be selected by each party. In case of default by either party in nominating an appraiser the one nominated by the other was to select the other. In case of the disagreement of the appraisers they were to appoint an umpire, the decision of the majority to be final. Before the expiration of the six years the lessor executed to S., assignee of the lessee, a release, which, after reciting the covenant to build, released S. therefrom, and declared that the lease should "in all its parts" thereafter be acted upon "the same as though such covenant had not been inserted therein;" also that the purpose of the release was

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to exonerate S., his heirs and assigns from all obligation arising from or growing out of the covenant. Before expiration of the term S. did erect upon the premises a dwelling-house of the description specified in the lease. In an action to compel a specific performance by the lessors, *held*, that the release discharged S. from any obligation to build, and if at the expiration of the lease no building erected under and as authorized by the provisions of the lease had been standing on the premises, the defendant would neither have been bound to renew the lease or pay the value of any building. But *held*, that the right to build during the term was preserved, and S., having availed himself of it, was entitled to the exercise by the defendant of the option either to pay the appraised value or to renew the lease.

The lease contained a covenant on the part of the lessee or assigns, that he or they would not let all or any part of the premises, or assign or transfer the lease without first having obtained the consent of the lessors in writing. The building erected by S. was an apartment-house; he occupied one range of rooms, the others he let to tenants by the month by verbal lease. This was known by defendant, and for eight years after the erection it received rent from S. without objection. *Held*, that this was, in effect, a license to use and occupy the premises as an apartment-house, and estopped defendant from claiming a forfeiture of the lease, because of such use.

As to whether the consent by defendant to the assignment to plaintiff was not a waiver of the covenant *quære*.

The judgment authorized defendant to appoint an appraiser to act with one appointed by plaintiff, and in case of neglect so to do, provided that the appraiser named by plaintiff might select another to act with him in fixing the valuations and, when determined, required defendant either to pay the value of the building or execute a new lease. It was claimed here by defendant that an action for specific performance could not be maintained by plaintiff until after he had procured the valuation to be made in the manner specified in the lease. *Held*, that as the objection was not taken on the trial it was not available here.

Also, *held*, the rule that a court of equity will not entertain an action for specific performance of an agreement to arbitrate did not apply, as the judgment did not compel defendant to appoint an arbitrator, and the appraisers, when appointed, will be appraisers selected by the parties in precise accordance with their agreement.

Also, *held*, that defendant could not refuse to give a new lease and turn the plaintiff, for his remedy, to an action at law on the covenant.

But, *held*, this was not a case for an extra allowance under the Code of Civil Procedure (§ 8252).

Also, *held*, that the judgment should be modified by incorporating a provision for the appointment of an umpire in the contingency mentioned in the lease.

(Argued November 29, 1887; decided January 17, 1888.)

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APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made November 6, 1885, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to compel a specific performance on the part of defendant as lessor of certain covenants in a lease executed by it to Thomas Kiernan.

The material portions thereof are set forth in the opinion, which also contains a substantial statement of the facts.

Sidney S. Harris for appellants. The plaintiff cannot maintain this action, because he failed to perform the condition precedent to his right to a new lease. (17 John. 405; 11 Hun, 211; Wood's Land. and T. 667; *Milnes v. Gery*, 14 Ves. 400; *Wilds v. Davis*, 3 Mer. 507; *Collins v. Collins*, 26 Beav. 306; *Vickers v. Vickers*, 5 Ch. [L. R.] 648; *Earl Dumby v. London*, 3 De. G. J. & S; 24; 2 H. L. [L. R.] 43; *Hopkins v. Gilman*, 22 Wis. 476; *People's Bank v. Mitchell*, 73 N. Y. 406.) The decree is erroneous in substance because it compels the appointment of an arbitrator by defendants; a court of equity will not compel the appointment of an arbitrator. (*Greason v. Keteltas*, 17 N. Y. 491; *Whitlock v. Duffield*, Hoffman Ch. R. 110; *Price v. Williams*, cited 6 Vesey, 818; *Tobey v. Co. of Bristol*, 3 Story, 800, 820, 823; *Robinson v. Keteltas*, 4 Edw. Ch. 67; *Street v. Rigby*, 6 Vesey, 815; *Noyes v. March*, 123 Mass. 286; *Connor v. Drake*, 1 Ohio St. 166; *King v. Howard*, 27 Mo. 21.) A decree of specific performance cannot be made to compel the execution of a lease where its terms are uncertain when the decree is made. (*Duffield v. Whitlock*, Hoff. Ch. R. 110; 49 N. Y. 499, 503, 505; Woods Land. and T. § 197.) The defendants are not obligated to give a new lease, as they have no longer the option to pay for the building. All obligation to give a new lease was dependent upon the alternative right or privilege to defendants of paying for the building erected under the lease, which no longer exists. (*Greason v. Keteltas*,

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17 N. Y. 406; *Bruce v. Fulton Bank*, 79 id. 163; *Abeel v. ———*, 13 Johns. R. 298; *Finkelmier v. Bates*, 92 N. Y. 178; *Bleeker v. Smith*, 13 Wend. 530, 535; 24 Hun, 617; *Doe v. Bliss*, 4 Taunton, 735.) The under-letting was of the land, as well as of the apartments in the building, and the covenant against under-letting applied. (*Pearce v. Colden*, 8 Barb. 522; *Keer v. Merchants Ex.* 3 Edw. Ch. 315; *Winston v. Cornish*, 5 Ohio, 303; *Graves v. Berdan*, 29 Barb. 100, 103-104; *Timens v. Baker*, 49 L. T. [N. S.] 106; *Doe v. Worseley*, 1 Camp. 20; *Roe v. Sales*, 1 M. & S. 297; *Inman Stamp*, 1 Starkie, 12; 1 C. & J. 391; Brown on Stat. of Frauds, § 20; Addison on Conts. §§ 201, 719; *Kutter v. Smith*, 2 Wallace, 491.)

Emile Beneville for respondent. The purpose and effect of the release was to relieve the lessee, Smith, from the obligation to erect the building mentioned in the lease within the period of six years, and to extend the time for such erection, during the entire term of the lease. (*Burr v. American Spiral Spring Co.*, 81 N. Y. 175.) The intent of the parties as to what part of the lease should be affected by the execution of the release, being established, this intent should be permitted to prevail. (3 R. S. [7th ed.] 2205, § 2; *Coleman v. Reade*, 97 N. Y. 545.) By acquiring the right to occupy apartments in a house for a period of time, the tenant does not acquire any interest in the land on which the building in which his apartments may be situated is standing, and if this be the case the tenant of such apartments acquired by his lease no right or interest in the demised premises. (*Keer v. Merchants Ex. Co.*, 3 Edw. Ch. 315; *Winston v. Cornish*, 5 Ohio Rep. 303; *Doe ex rel. Freeland v. Burt*, 1 T. R. 701.) The lease gives the right to sublet apartments in the buildings erected by the lessee, since it permits the erection of a dwelling or tenement house, the apartments whereof are specially destined to be sublet. (*Hare v. Horton*, 5 Barn. & Adol. 715; 2 Pars. on Cont. 516; *Trustees of Columbia College v. Thatcher*, 87 N. Y. 811.) Actual performance of an act, which is the

consideration of an agreement, supplies the place of a previous agreement, to perform such act. (*Beckwith v. Brackett*, 97 N. Y. 52.) Even if any technical formality in respect to the notice for a renewal had not been fully complied with by the respondent, equity would give relief. (*Reid v. St. John*, 2 Daly, 213; Story Eq. Jur. § 1319.)

ANDREWS, J. The true construction of the release executed by the defendant to the plaintiff, July 22, 1864, as bearing upon the covenant of renewal contained in the lease from the defendant to Thomas Kiernan, assignor of the plaintiff, dated July 1, 1862, constitutes one of the material questions in this case. The lease was for a term of twenty-three years; it contained among other covenants by the lessee, a covenant for himself, his administrators and assigns, to erect and build, or cause to be erected and built, on the demised premises "within six years from the date of the lease, a good and substantial brick dwelling-house of at least four stories in height above the basement," and the covenant was followed by the provision that "in default of the erection of such dwelling-house these presents and the estate hereby granted shall thenceforth cease and be void." The lease then further declares in substance that it is mutually agreed between the parties that if the lessee, his executors, administrators or assigns shall, "within the time aforesaid" erect such dwelling-house, and the same shall be standing on the premises at the expiration of the term, and the lessee shall faithfully fulfill and perform all his other covenants in the lease, the lessors shall and will at the expiration of the term, "at their option," either grant a new lease for the further term of twenty years at such annual rent as shall be agreed upon by the parties, or otherwise settled and ascertained as provided in the lease, but not less than the rent reserved therein, or then pay the just and fair value of the dwelling-house, to be ascertained as provided. The lease further provides for the appointment of appraisers "to value such dwelling-house in its then actual condition (*i. e.*, at the time of the arbitration), and also to determine

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what would be reasonable yearly rent for said lot during the next ensuing term of twenty years," each party to nominate one and to signify such nomination to the other at least one year before the expiration of the current term, and in default of such nomination by either party for thirty days after the time so limited, the nominee of the other party was authorized to associate with himself another person for the purpose of the valuation, and in case of the disagreement of the appraisers, they to appoint an umpire, the decision of the majority to be final and conclusive. The lease also prescribed that for the purpose of fixing the rent for the renewal term the lot should be considered and valued as vacant and unoccupied, and that five per cent on such estimated value should be the annual rent in case of renewal.

The lessee, on the 14th day of December, 1863, with the consent of the lessor, assigned the lease to the plaintiff. On the 22d of July, 1864, the defendant executed to the plaintiff a release under seal, which after reciting *in totidem verbis* the covenant of the lessee to build on the demised premises contained in the lease, and also the provision that the lease should be forfeited in case the house was not erected and built within the time specified, proceeds as follows: "Now this agreement witnesseth, that the said parties of the first part in consideration of the premises and of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, hereby release and discharge the said Smith, his heirs and assigns, of and from the said covenant and agreement to build in said lease contained, and the said lease in all its parts shall hereafter be acted upon by the respective parties, the same as though such covenant had not been inserted therein, and all other parts of said lease shall be interpreted accordingly, this release being given to exonerate said Smith, his heirs and assigns of and from all obligations arising from or growing out of the said agreement, in said lease contained. In witness whereof," etc. Thereafter, in 1876, the plaintiff erected on the demised premises a four story brick dwelling-house, of the description mentioned in the lease, and in April, 1884, appointed an

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arbitrator under the provisions of the lease and notified the defendant thereof, but the defendant declined to appoint an arbitrator or to renew the lease on the grounds, first, that the release of July 22, 1864, by its true construction abrogated and annulled the covenant for renewal, and also the alternative and dependent obligation to pay for any building erected on the premises, and second, that the plaintiff by under-letting the premises without the consent of the lessor, in violation of a covenant in the lease, had thereby incurred a forfeiture.

The learned trial judge construed the release as operating merely to release the plaintiff from the obligation to build within six years from the date of the lease, and as extending the time so as to give to the plaintiff the entire remainder of the term of twenty-three years within which to perform the covenant, but held that it did not otherwise discharge or affect the covenant and that the plaintiff remained bound to build at some time within the term. The language of the release does not, we think, justify this interpretation. The operative words of the instrument are in the most general and comprehensive language. The plaintiff is released "from the said covenant and agreement to build in the said lease contained." It declares that "the lease in all its parts shall hereafter be acted upon by the respective parties the same as if the covenant had not been inserted therein," and by the final clause it declares that the purpose of the release is "to exonerate the said Smith, his heirs and assigns from all obligation arising from, or growing out of the said agreement in said lease contained." The recital it is true refers to the time within which, by the lease, the building was to be erected, but only as a part of the covenant, the whole of which is embraced in the recital. We think the release wholly discharged the plaintiff from any obligation to build, and that thereafter the lease stood as though no covenant to build had been inserted. We concur in the proposition of the learned counsel for the defendant, that the main consideration for the conditional covenant of renewal by the lessee was the enhancement of the value of the demised premises by the erection of the building men-

tioned in the lease, and also in the proposition that if no building was standing on the demised premises at the expiration of the term, or if a building was standing thereon at that time, but one not erected under the provisions of the lease, that in either case the plaintiff would be remediless and that the defendant would not be bound either to renew the lease or to pay the value of the building. The covenant to build, contained in the lease at the time of its execution, imposed upon the lessee the burden of making a valuable erection upon the demised premises, for the expense of which he was to be reimbursed at the end of the term, either by receiving its value or by a renewal of the lease for a long term, during which the rental value of the property above the ground rent would, as he manifestly contemplated would be the case, repay him for the expenditure. On the other hand, if the defendant elected to renew the lease at a small ground rent, it would receive the premises at the end of the renewal term, increased in value by the building erected by the lessee, free from any obligation to pay its value. We are of opinion that if the effect of the release of July 22, 1864, was not only to discharge the plaintiff from any obligation to build, but also to deprive him of any right under the lease to build during the term, the further result would follow that the covenant on the part of the defendant to renew the lease or to pay the value of the building, at the expiration of the term, would also fall with the failure of the consideration upon which it was based. The erection of a building by the plaintiff, not authorized by the lease, would be a mere voluntary act which would furnish no consideration for and give no right to a renewal. The obligation to build was discharged by the release; but the right to build during the term was, we think, preserved, and the plaintiff having built became entitled to the exercise by the defendant of the option provided by the lease. Striking out of the lease the covenant of the lessee to build, there remains the agreement that if the lessee shall build and the building shall be standing on the demised premises at the end of the term, the defendant

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would either pay the appraised value or renew the lease. This construction gives full effect to the release, and is the practical construction put upon it by the parties. The plaintiff erected a building in 1876, and the defendant in 1884, before any question had arisen, applied to the plaintiff to be informed whether he intended to renew the lease. It is familiar law that if one person agrees to do a particular thing, provided another shall do a certain other thing, performance by the latter supplies the lack of a previous promise to do the thing and entitles him to enforce the agreement of which his act was the consideration. (*Beckwith v. Brackett*, 97 N. Y. 52.) We are of opinion, therefore, that in the absence of any other defense the plaintiff is entitled to the exercise of the option reserved to the defendant.

The lease contained a covenant by the lessee, his executors, administrators, or assigns, that he or any of them "shall not, or will not at any time or times hereafter, during the term hereby granted, lease, let or demise all or any part of the said premises, nor assign, transfer or make over the same or the present lease, or any of the renewals of his or their term, to any person or persons whomsoever without the consent of the parties of the first part, their successors or assigns, in writing under their seal, for that purpose first had and obtained." It was shown on the trial that the house erected by the plaintiff was an apartment-house and that the plaintiff occupied one range of rooms and let the other apartments to tenants by the month, by verbal lease, the rent being exacted each month in advance. It further appeared that the house had been occupied in this manner from the time it was built in 1876, and that in November of each year down to and including November, 1884, the plaintiff paid to the defendant the rent due under the lease, which was at all times received without objection, and the evidence justifies the conclusion that it was received by the defendant with full knowledge of the character of the house, and that it was occupied as an apartment-house. Subsequent to the commencement of this action rent fell due, which was not received, and it is claimed by the defendant.

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that it is entitled to insist that the lease was forfeited by the under-letting of apartments in the house after November 1, 1884, and that the receipt of rent up to that time did not operate to waive a subsequent breach of the condition. Forfeitures are not favored and *Dumppor's Case* (2 Coke, 119) is a notable instance of the strong leaning of courts against enforcing them. Following the principle of that case it was held in *Brummell v. Macpherson* (14 Ves. 173), that a condition against assignment in a lease was determined forever by the consent of the lessor to an assignment, although "to one particular person subject to the covenants in the original lease." The defendants on the 14th of December, 1863, consented in writing that Kiernan, the original lessee, might assign the lease to the plaintiff upon the condition that the assignee should perform the covenants in the lease.

But passing the question of the effect of this consent upon the rights of the parties, we are of opinion that the conduct of the defendant in receiving for a series of years without objection, the rent due on the lease, with knowledge of the actual situation, should, if necessary, be construed as a license to use and occupy the building as an apartment house, and not as a mere waiver from time to time of a particular antecedent breach of the covenant. The construction of the house indicated that it was designed for permanent use as an apartment house. It is consistent with the circumstances and with fair dealing to construe the acts and silence of the defendant as an assent that the somewhat peculiar interest created by the letting of the apartments from time to time for brief periods, was not an under-letting or parting with any interest in the demised premises, within the meaning of the covenant. The interest of an occupier of an apartment is peculiar. He has simply the right to occupy designated rooms during the time specified, but a destruction of the building ends the right (*Kerr v. Merchant's Ex. Bank*, 3 Edw. Ch. 315; *Graves v. Berdan*, 29 Barb. 100), and thereafter he would retain no interest in the lot. Letting rooms to lodgers is held not to be a breach of a covenant against under-letting. (*Doe v.*

Laming, 4 Camp. 73; see also *Wilson v. Martin*, 1 Denio, 602; *White v. Maynard*, 111 Mass. 250.) The plaintiff at all times occupied a part of the premises, and the defendant had the protection which his personal oversight would afford. It would be inequitable to permit the defendant to insist upon a forfeiture, when by its conduct it had sanctioned the construction which the plaintiff had placed upon the covenant.

The final question relates to the right of the plaintiff to the relief given by the judgment which in substance authorizes the defendant to appoint an appraiser within a specified time, to act in conjunction with the appraiser appointed by the plaintiff in fixing the values specified in the lease, and in case the defendant neglects to make such appointment, the judgment provides that the appraiser named by the plaintiff may associate with himself another appraiser to fix the valuations, and that when the valuations are determined, the defendant is required either to pay the value of the building as ascertained, or execute a new lease in accordance with the provisions of the covenant of renewal in the original lease. It is insisted that the plaintiff cannot maintain an action for specific performance until he has procured the valuation to be made in the manner pointed out by the lease. This objection is, in substance, that the action is premature. But the objection was not taken on the trial, and it seems that the action was brought on the invitation of the counsel for defendant "to facilitate the settlement of the points of difference" between the parties. It is further insisted that a court of equity will not entertain a bill for the specific performance of an agreement for arbitration. The judgment does not compel the defendant to appoint an arbitrator. It permits the defendant to name an appraiser, and if it fails to do so, provides for an appointment in behalf of the plaintiff in the manner provided in the lease. The appraisers when appointed will be the appraisers selected by the parties in precise accordance with their agreement. It is further insisted that the defendant having refused to renew the lease, the only remedy of the plaintiff is an action to recover the value of the building.

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The contract binds the defendant either to pay such value, or execute a new lease. It is bound to perform its contract by availing itself of one or the other of these alternatives. It cannot refuse to give a new lease and turn the plaintiff out of possession, leaving him for his remedy to an action at law on the covenant.

We think this was not a case for a statutory allowance under section 3252 of the Code. (See *Gray v. Robjohn*, 1 Bosw. 618.)

The judgment should be modified in this respect, and also by incorporating therein the provision for the appointment of an umpire in the contingency mentioned in the lease, and as so modified, it should be affirmed with costs.

All concur.

Ordered accordingly.

MEMORANDA

OF THE

*CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, AND NOT REPORTED IN FULL.*

**KENNETH F. MACLENNAN, Respondent, v. THE LONG ISLAND
RAILROAD COMPANY, Appellant.**

(Argued May 9, 1887; decided October 11, 1887.)

E. B. Hinsdale for appellant.

Oliver W. West for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

**GEORGE H. BARTHOLOMEW, Appellant, v. THE MERCANTILE
MARINE INSURANCE COMPANY, Respondent.**

(Argued June 15, 1887; decided October 11, 1887.)

J. Sanford Potter for appellant.

M. A. Sheldon for respondent.

Agree to affirm and for judgment absolute against plaintiff
on stipulation.

All concur ; no opinion.

Judgment accordingly.

EDMUND RICHARDSON, Appellant, v. HENRY R. JACKSON et al.,
Respondents.

(Argued June 15, 1887; decided October 11, 1887.)

Stephen P. Nash and *Aaron Pennington Whitehead* for
appellant.

Henry R. Jackson and *John E. Ward* for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE MERCHANTS' STEAMSHIP COMPANY, Respondent, v. THE
COMMERCIAL MUTUAL INSURANCE COMPANY, Appellant.

(Argued June 17, 1887; decided October 11, 1887.)

David Willcox for appellant.

George Zabriskie for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

SARAH E. BAUCUS, Appellant, v. JAMES BARR et al.,
Respondents.

(Argued June 20, 1887; decided October 11, 1887.)

Robert H. McClellan for appellant.

A. D. Wait for respondents.

Agree to affirm on opinions of General and Special Terms.

All concur except EARL, J., dissenting; RUGER, Ch. J., not
sitting, and ANDREWS, J., not voting.

Judgment affirmed.

SEBA JANE GEDNEY, Appellant, v. DANIEL ROGERS,
Respondent.

(Argued June 27, 1887; decided October 11, 1887.)

Erastus P. Hart for appellant.

E. Countryman for respondent.

Agree to affirm on opinion at Special Term.

All concur.

Judgment affirmed.

REMMAR STAAL, Respondent, v. THE GRAND STREET AND
NEWTOWN RAILROAD COMPANY, Appellant.

In an action to recover damages for personal injuries caused by defendant's negligence, where no evidence is given as to the circumstances and condition in life of the plaintiff, his earning power, skill and capacity, no damages for future pecuniary loss can be awarded.

(Argued July 1, 1887; decided October 11, 1887.)

The following is the opinion nerein :

"The plaintiff brought this action to recover damages for injuries which he claimed to have sustained while alighting from one of the defendant's cars in which he was a passenger, and he recovered a judgment which has been affirmed at the General Term."

"This appeal brings to our attention only exceptions to the charge of the trial judge relating to the damages which the jury might award. That portion of the charge and the exceptions thereto are as follows: That the plaintiff 'is entitled to recover, as damages in this action, compensation—first, for the pain and suffering that he has encountered; second, as this injury is to some extent at least permanent, he is entitled to compensation for the results which will flow in the future from this injury; that is, for any suffering and inconvenience he will have in life resulting from this injury, and for pecuniary loss on account of the injury caused by the

diminution in his ability to earn a livelihood. There is no hard rule to be laid down to you in this case. You must say, under all the circumstances, considering what pain he has suffered, what his loss has been, in his circumstances in life, the chances of what money he would make, and his age, considering the injury and the results of that injury, what would be a fair compensation. All that is left to the good sense of the jury.' The counsel for defendant then excepted 'to that part of your honor's charge in which you say that the jury may allow him his pecuniary losses resulting from his disabilities owing to this accident,' and he requested the judge to charge that 'the jury should take into consideration the great age of the plaintiff as affecting future continuance of life.' The judge replied: 'I charge that; and I will say further, that in this case there is no proof of loss shown by what his income was up to that time. What the court therefore told you as to pecuniary losses was in connection with the future.' To that defendant's counsel excepted, and requested the judge to charge that the jury could not "make further allowance to the plaintiff for expenses of treatment or care for the past or future.' In reference to this request the judge said: 'I charge that for the past. For future expenses the jury have a right to consider the expenses of this injury if they find this renders the plaintiff to any extent helpless, and also to consider to what expenditures to make him comfortable he will have to go;' and to that defendant's counsel excepted.

"This is the entire charge relating to the damages, and that it may be appreciated, it must be stated that immediately after the injury the plaintiff was taken to a charity hospital, where he remained about three months, that he then went to another charity hospital where he remained several months, and that he then went to the county alms house where he remained until the time of the trial, not having at any time been subjected to any personal expenses. There was proof that the plaintiff was a fresco painter, and that for some time before his injuries he had been employed by a person who was engaged in the business of painting.

"No special damages and no pecuniary losses, past or future were alleged in the complaint. There was no proof whatever as to the plaintiff's circumstances in life except that before the injury his 'general health was very good.' There was no proof touching his age, habits, capacity, ability to work, skill in his trade, his wages or his earnings or the compensation he was able to earn or his chances of getting work. There was not even any proof that he had earned or that he was able to earn a livelihood.

"The judge recognizing the rule laid down in *Leeds v. Metropolitan Gas Light Company* (90 N.Y. 26) finally charged that the proof did not authorize the jury to award any damages for inability to work and earn wages prior to the trial. But he charged that they could allow such damages for the future, that is, that they could take into account as a distinct item of damages the plaintiff's pecuniary loss 'on account of the injury caused by the diminution in his ability to earn a livelihood,' and 'the chances of what money he would make' but for the injury.

"This charge was clearly in conflict with the rule laid down in the case cited. In that case we held that where loss of time is claimed as an item of damages in such a case as this, if plaintiff fails to prove the value of the time lost or facts on which an estimate of such value can be founded, only nominal damages for that item can be given. There it was proved that the plaintiff was engaged in business at the time of the injury and that he had not been able to attend to his business since; but it was not shown what his business was, or the value of his time or any facts as to his occupation from which the value could be estimated. The court charged that the plaintiff if entitled to a verdict was 'entitled to recover compensation for the time lost in consequence of confinement to the house or in consequence of his disability to labor from the injury sustained.'

"The charge was held to be erroneous as the jury was left to guess at or speculate upon the value of the lost time without any basis in that respect for their judgment to rest upon. It is true that the charge there related to past loss. But if a jury cannot without any adequate basis guess or speculate in such

an action, as to the pecuniary loss suffered by the plaintiff before the trial, we can perceive no reason for not applying the same rule to future pecuniary loss. Before damages for future pecuniary loss can be awarded, there should be some proof such as a party can always give of his circumstances and condition in life, his earning power, skill and capacity. So much is left to the arbitrary judgment of jurors in this class of cases that the rule which requires such proof of pecuniary loss should not be relaxed.

"The judgment should, therefore, be reversed, and a new trial granted, cost to abide event."

Albert G. McDonald for appellant.

A. Simis, Jr. for respondent.

EARL, J., reads for reversal and new trial.

All concur, except RUGER, Ch. J., and DANFORTH, J., dissenting.

Judgment reversed.

MARTIN CHORNELIUS, Respondent, v. DAVID C. HOLTON et al.,
Appellants.

(Argued October 3, 1887; decided October 18, 1887.)

Joseph A. Shoudy for appellants.

J. Edward Swanstrom for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM O. DOUGLASS, Respondent, v. EDWIN B. LOW, as
General Guardian, etc., Appellant.

(Argued October 4, 1887; decided October 18, 1887.)

Richard L. Hand for appellant.

S. A. Kellogg for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

BEZALEEL H. DUPIGNAC, Appellant, *v.* MARGARETTA DUPIGNAC
et al., Respondents.

(Argued October 4, 1887; decided October 18, 1887.)

Louis C. Waehner for appellant.

James Troy for respondents.

Agree to affirm ; no opinion.

All concur.

Order affirmed.

MICHAEL L. HUNT, Appellant, *v.* THE CITY OF OSWEGO,
Respondent.

(Submitted October 4, 1887; decided October 18, 1887.)

This case presented the same question and was decided on authority of *Gage v. Village of Hornellsville* (106 N. Y. 667).

W. H. Kenyon for appellant.

Elisha B. Powell for respondent.

RUGER, Ch. J., reads *mem.* for reversal of order of General Term, and affirmance of that of Special Term.

All concur.

Ordered accordingly.

JOHN BROOKS LEAVITT, Respondent, *v.* LEWIS S. CHASE,
Appellant.

(Argued October 4, 1887; decided October 18, 1887.)

Abram Kling for appellant.

Austen G. Fox for respondent.

Agreed to modify order by striking out provision for short notice of trial, and for affirmance, as modified.

All concur.

Ordered accordingly.

FLEMING STANHOPE PHILIPS, Respondent, *v.* THE GERMANIA
BANK, Appellant.

An *ex parte* order was made by a justice of the Supreme Court for the examination of one of defendant's officers before trial. Upon motion made before another justice on the papers on which the order was granted, and other affidavits and papers, the order was vacated. The justice who granted the first order was a member of the General Term which heard an appeal from the second order. *Held*, that as the first order was not under review by the General Term, the objection that the court, as constituted, was violative of the constitutional prohibition against a judge or justice sitting in General Term in review of a decision made by him was not tenable. (State Const., § 8, art. 6.)

(Argued October 4, 1887; decided October 18, 1887.)

The following is the *mem.* of opinion in this action:

"The defendant was a Massachusetts corporation and the plaintiff was in its employment under a contract whereby he was to receive a share of its profits as compensation for his services, and he commenced this action to recover his share of the profits. On the 18th day of March, 1887, Judge Van Brunt made an order under section 872 of the Code of Civil Procedure requiring Herman Stursburg, who was one of the directors and the treasurer of the defendant, to appear before him or some other judge of the Supreme Court at chambers on the 28th day of March, 1887, for the purpose of being

examined "pursuant to the provisions of the Code of Civil Procedure in such cases made and provided." Thereafter on the day named a motion was made on behalf of the defendant, before Judge PATTERSON at chambers, to vacate Judge VAN BRUNT's order. That motion was based upon the papers upon which the order was granted and the affidavit of Stursberg and other papers, and after hearing counsel for both parties an order was granted vacating the order for the examination of Stursberg provided the defendant stipulated to allow an examination of its books, which stipulation was given. From that order plaintiff appealed to the General Term, and there the order of Judge PATTERSON was reversed and the order of Judge VAN BRUNT was reinstated, with costs and disbursements; and the examination of Stursberg under the first order was set down for the 15th day of August, 1887. The General Term was composed of Judges VAN BRUNT, DANIELS and BARTLETT, and Judge VAN BRUNT wrote the opinion. From the order of the General Term the defendant appealed to this court, and the point is now made, so far as the record appears for the first time, that the General Term was not properly constituted for the reason that Judge VAN BRUNT was a member thereof, and thus that section 8 of article 6 of the Constitution was violated, which provides that "no judge or justice shall sit at a General Term of any court or in the Court of Appeals in review of a decision made by him or of any court of which he was at the time a sitting member." The answer to this objection is that Judge VAN BRUNT's order was not under review at the General Term, but the order of Judge PATTERSON was the subject of consideration. That order was not based upon the same papers that were presented to Judge VAN BRUNT, but upon additional papers; Judge PATTERSON was not acting upon an appeal from Judge VAN BRUNT's order, and was not strictly sitting in review of his order, but upon new papers he heard a motion to set it aside. That motion was a new and distinct proceeding, not a continuation of the proceeding commenced before Judge VAN BRUNT. The General Term had no occasion to determine whether the order granted *ex parte* by Judge VAN BRUNT was

well granted or not. On the papers presented to him there could be no reasonable dispute that it was well granted. The question which the General Term had to determine was whether upon all the papers appearing before Judge PATTERSON he properly vacated the previous order, and we are therefore of opinion that it cannot be said that the General Term was in any proper sense sitting in review of the decision made by Judge VAN BRUNT.

"Whether upon all the papers before the General Term there were sufficient facts to justify the examination of Stursberg under the section referred to rested in its discretion. The papers showing a formal compliance with the section, the exercise of its discretion is not reviewable here.

"The appeal should therefore be dismissed."

Joseph A. Shoudy for appellant.

Larned & Curtis for respondent.

EARL, J., reads for dismissal of appeal.

All concur.

Appeal dismissed

WILLIAM C. HERRING, as Trustee, etc., Appellant, v. MARY C.
BERRIAN et al., Respondents.

(Argued October 4, 1887; decided October 18, 1887.)

S. R. Ten Eyck for appellant.

Ferdinand Kurzman for respondents.

Agree to affirm; no opinion.

All concur.

Order affirmed.

LOUIS SCHNEIDER, Respondent, v. CARL L. QUOSBARTH,
Appellant.

(Argued October 5, 1887; decided October 18, 1887.)

Eugene K. Sackett for appellant.

A. Blumensteil for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN A. KELLY, Respondent, v. BRIDGET E. KEARNS,
Appellant.

(Argued October 5, 1887; decided October 18, 1887.)

Morris & Pearsall for appellant.

Sidney V. Lowell for respondent.

Agree to affirm , no opinion.

All concur.

Judgment affirmed.

CORNELIUS S. GROOT et al., Respondents, v. FREDERICK G.
AGENS, Appellant.

Where one who ought to have been, but was not, joined as a party plaintiff in an action dies before the trial, and the plaintiffs named fully own and represent the cause of action, the fact of such death may be proved in reply to a plea in abatement, setting up the non-joinder.

(Argued October 6, 1887, decided October 25, 1887.)

The following is the *mem.* of opinion herein :

"The complaint in this action contained two counts, one for the purchase and sale of stocks and advance of moneys and for commissions and interest, such purchases and sales having been made at the request of defendant, whereby the latter had become indebted to the plaintiffs in the amount claimed ; and the other for the same amount upon an account stated. The answer served pleaded the non-joinder of Hop-

per as a party plaintiff in abatement of the action, alleging that he was a partner and jointly interested with the plaintiffs in the demand sued upon, and was living at the commencement of the action. Upon the trial the counsel for the plaintiffs, for the purpose of defeating the plea in abatement, asked a witness if Hopper was dead, to which the defendant objected giving as a reason 'the matters arising subsequent to the commencement of this action and not in discharge of the indebtedness therein created, are not admissible, especially when as in this case a plea of abatement was interposed by reason of the fact that Mr. Hopper was living at the time when the answer was served.' The objection was overruled and the defendant excepted and now claims that since the referee found as a fact that Hopper was not dead at the date of the commencement of the action, the plea in abatement could not be defeated by the evidence objected to. The point is extremely technical and without any merit behind it, and it is not unreasonable to treat very strictly the form of the objection. It was unsound on its face for two reasons. The question did not ask for a matter 'arising' subsequent to the commencement of the action, but for an existing fact irrespective of the question when it arose or occurred; and the plea did not allege, as the objection assumes, that Hopper was living when the answer was served. There is no finding and no proof that Hopper was living at that date, and, unless he was, the plea of non-joinder had no force when it was made. But if that had been true we see no good reason for hesitating to say that proof of Hopper's death at the date of the trial was admissible and a complete answer to the plea in abatement. The object of that plea, when founded upon a defect of parties plaintiff, is to give a better writ and so protect the defendant by a correct judgment. But if before the judgment is rendered one who ought to have been joined is dead, and the named plaintiffs fully own and represent the cause of action, there can be no better writ, and all force and effect is gone from the plea. The fact which has happened gives to the defendant the full benefit of his plea. He is exactly as safe as if Hopper had lived, and the plaintiffs, by amendment, had joined him with them. If he had been joined originally

and then died, a mere suggestion on the record without amendment or supplemental pleading would permit the action to proceed in the name of the survivors; and, on the other hand, where they alone sue and the death of one who ought to have been joined obviates the defect of non-joinder, we see no reason why it may not be proved and defeat the plea which has become useless and without merit. No other question in the case requires consideration.

"The judgment should be affirmed."

Thomas Darlington for appellant.

FINCH, J., reads *mem.* for affirmance of judgment, with costs.
All concur.

Judgment affirmed.

THEODORE D. YORKS et al., Respondent, v. J. FRANKLIN PECK
et al., Appellants.

(Argued October 6, 1887 decided October 25, 1887.)

John L. Hill for appellants.

James Wood for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

WILLIAM H. WARING, Respondent, v. MOSES CHAMBERLAIN,
Appellant.

(Argued October 6, 1887. decided October 25, 1887.)

Nelson Smith for appellant.

Charles E. Rushmore for respondent.

Agree to affirm; no opinion.

All concur except RAPALLO and PECKHAM, JJ., not voting

Judgment affirmed.

JOHN G. HARBOTTLE et al., Appellants, v. JOHN FARRELL et al.
Respondents.

(Submitted October 7, 1887; decided October 25, 1887.)

Hannibal Smith for appellants.

Porter & Walts for respondents.

Agree to dismiss appeal on the ground that the amount in controversy is less than \$500; no opinion.

All concur.

Appeal dismissed.

ELISHA M. SHUTLEFF, Respondent, v. THE UTICA AND BLACK
RIVER RAILROAD COMPANY, Appellant.

(Submitted October 7, 1887; decided October 25, 1887.)

A. M. Beardsley for appellant.

Porter & Walts for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN D. HAMILTON, Appellant, v. WILLIAM AUSTIN et al.,
Respondents.

(Argued October 9, 1887; decided October 25, 1887.)

George F. Hine for appellant.

William G. Tracy for respondents.

Agree to affirm and for judgment absolute against appellant on stipulation.

All concur.

Order affirmed and judgment accordingly.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Respondent, *v.* CHARLES VON GLAHN, Impleaded, etc., Appellant.

A mortgage upon real estate in the city of Brooklyn contained a provision requiring the mortgagor to pay all taxes, charges and assessments on the premises, and in default thereof the mortgagee was authorized to pay the same "with any expenses attending," and any amount so paid was made a lien upon the premises. In an action to foreclose the mortgage it appeared that there were numerous taxes and assessments charged upon the premises which the mortgagor did not pay, some of which were illegal; that the mortgagee employed an expert to investigate and determine what were legal and to see that proper deductions were made for the illegal charges, agreeing to pay him twenty-five per cent of the amount he might succeed in having deducted. The mortgagee paid the legal liens and the percentage so agreed upon. *Held*, that the latter was a proper item of expense, and when paid became a lien upon the mortgaged premises; and that a tender which did not include such item was insufficient.

(Argued October 10, 1887; decided October 25, 1887.)

The following is the opinion in this action:

"On the 1st day of November, 1869, the defendant, Doscher, owning certain real estate in the city of Brooklyn, executed to the plaintiff a mortgage thereon, to secure the sum of \$4,000. The mortgage contained a provision that the mortgagor should pay 'all taxes, charges and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, and in default thereof that it shall be lawful,' for the mortgagee, 'to pay the amount of any such tax, charge or assessment, with any expenses attending the same, and any amount so paid' the mortgagors covenanted to repay, with interest, and that the same should be a lien upon the premises. On the 5th day of May, 1870, Doscher executed another mortgage on the same real estate to the defendant Von Glahn. In December, 1882, Von Glahn commenced an action in the Supreme Court to foreclose his mortgage, and his action resulted in a foreclosure of the mortgage and a sale of the premises, at which he became the purchaser on the 15th day of March, 1883. On the following day he received a deed and took possession, and has ever since

been the owner and in possession of the premises. On the 15th day of March, 1883, Von Glahn informed the plaintiff of his purchase and possession of the premises, and it then insisted upon the payment of its mortgage. On the 9th day of April, 1883, Von Glahn formally tendered to it, absolutely and unconditionally, \$5,830 in United States legal tender currency, in payment of its mortgage, which it refused to receive solely upon the ground that the sum was insufficient in amount. The total amount due on its mortgage at the time of the tender was \$5,797.93, unless it was entitled to include therein \$58.48 paid to one Mossdrop, which will be more particularly referred to hereafter. In May thereafter it commenced this action to foreclose its mortgage. In his answer Von Glahn alleged as a defense to the action the tender of the amount due upon the mortgage, claiming that such tender operated to release the mortgaged premises from the lien of the mortgage. At the Special Term the defense was held sufficient and a judgment was rendered dismissing the complaint. From that judgment the plaintiff appealed to the General Term where the judgment was reversed and a new trial granted, and then the defendant Von Glahn appealed to this court.

"It is unnecessary for us to determine precisely what effect the tender of Von Glahn, which was not kept good, had, under the circumstances of this case, because there is another ground upon which the decision of the General Term can be sustained. Upon the trial it appeared that there were taxes and water rates for five consecutive years, commencing in the year 1877, and some assessments for grading and paving and for a sewer, amounting in all to more than \$1,000, all charges upon the land which were due and unpaid, and which the mortgagor had neglected to pay. The plaintiff paid such taxes and assessments, and in reference to such payment the trial court found as follows:

"'TWELFTH. That on the said 27th day of June, 1882, the plaintiffs, in order to prevent the accumulation of interest upon said unpaid taxes, water rates and assessments, and in pursuance of the powers and privileges which their said mort-

gage by the said tax clause therein contained conferred upon them and vested them with, resolved to pay these unpaid liens, but in order to effect such payments at the smallest possible cost, and so that said mortgaged premises should receive the greatest possible benefit therefrom, they, still acting by virtue, and in pursuance of said powers and privileges with which they were indued as aforesaid, and so far as one of said assessments was concerned, at the instance also of said John H. C. Doscher who continued to be the owner of said mortgaged premises, and was the only person interested therein (except the defendant Anna L. C. Doscher, his wife), of or as to whom said plaintiffs had any knowledge or information further resolved that before they paid any one of said unpaid liens, they would submit the matters of the payment of them all to one Thomas D. Mossdrop, a tax searcher in the said city of Brooklyn, so that said Mossdrop might endeavor to reduce, or cancel any item of principal, or interest, or advertising that might be illegally charged in the case of any or either of said unpaid liens, and agreed with the said Mossdrop to pay him twenty-five per cent of the amount he might succeed in having deducted from the entire amount which might be claimed upon said unpaid liens.'

"In pursuance of his employment, Mossdrop examined and investigated each of the taxes, water rates and assessments; saw that proper deductions were made therefrom under the act, Chapter 348 of the Laws of 1882, and procured accurate bills of the amounts which should be paid upon the same, and took them to the plaintiff who then paid them, and also paid him for his services \$58.48 which is the item above referred to which was in dispute between the parties. The plaintiff claims that the sum thus paid to Mossdrop was an expense within the meaning of the mortgage attending the payment of the taxes, water rates and assessments.

"It is not entirely clear what expense was alluded to in the phrase in the mortgage 'with any expense attending the same.' If its meaning is doubtful the doubt may be solved in favor of the mortgagee, as the language is that of the mortgagor. On the part of the defendant it is claimed that the word

expense had reference to penalties, the expenses of redemption from any sale, and other similar expenses attending the taxes, and not an expense attending the ascertainment and payment of them. We think this is too narrow a construction. The word 'expense' is quite inapt and would not naturally be used to cover penalties, and as both mortgagor and mortgagee were at liberty to pay the taxes and both interested to pay, then it cannot be presumed that the parties contemplated a sale of the premises for non-payment of the taxes, and expenses thus made. The mortgage made it the express duty of the mortgagor to make prompt payment of these charges, and authorized payment by the mortgagee only in case of his default. Any expense which by his default he imposed upon the mortgagee was probably within the contemplation of the parties, and it could not have been within their contemplation that the mortgagor could voluntarily omit to pay the taxes and thus shift from himself to the mortgagee, ignorant of the facts relating to the taxes, the burden of bearing the necessary expense attending their payment. It is just that the mortgagor should bear such expense. Here were numerous taxes, water rates and assessments, under the complicated system of taxation and assessment existing in the city of Brooklyn, charges upon these lands. While the mortgagee had the right to pay for its protection these charges and add them to its mortgage, yet it could pay only such as were legal and collectible, and as the mortgagor was under obligations to pay. Hence it became important that they should be carefully scrutinized to ascertain how much was due for them and to protect the mortgagee from any illegal exaction. For that purpose it was entirely proper for it to employ an expert, acting in good faith, and the reasonable expense of such an expert became a fair charge under this mortgage against the mortgagor, and within its terms a lien upon the mortgaged premises. This construction is neither inconvenient nor under such a mortgage dangerous. The mortgagee must act in good faith, with reasonable judgment, and the expense must be reasonable in amount. When all these concur there is no reason or equity in imposing the expense upon the mortgagee and relieving the defaulting mortgagor and his land therefrom.

"We are, therefore, of opinion that the tender was insufficient in amount, and ineffectual; and for this reason the order of the General Term should be affirmed and judgment absolute rendered against the appellant upon his stipulation."

Freling H. Smith for appellant.

George Waddington for respondent.

EARL, J., reads for affirmance of order and for judgment absolute against appellant on stipulation.

All concur except RUGER, Ch. J., not voting; DANFORTH, J., concurring in result.

Order affirmed and judgment accordingly.

FRANK HARDING, Respondent, *v.* THE NEW YORK, LAKE ERIE
& WESTERN RAILROAD COMPANY, Appellant.

(Argued October 11, 1887; decided October 25, 1887.)

George F. Brownell for appellant.

Frank Harding respondent in person.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THEODORE WACKERMAN, Respondent, *v.* JOHN P. ZENNER,
Appellant.

(Argued October 11, 1887; decided October 25, 1887.)

Adelbert Moot for appellant.

Charles H. Ribbel for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

DAVID F. DAY, Respondent, *v.* JAMES C. STRONG, Impleaded,
Etc., Appellant.

(Argued October 11, 1887; decided October 25, 1887.)

James C. Strong, appellant in person.

R. L. Burrows for respondent.

Agree to modify judgment by conforming the interest to the statutory rate after January 1, 1880, and to affirm as modified.

All concur.

Judgment accordingly.

THOMAS SWORDS et al., Respondents, *v.* THE NORTHERN LIGHT
OIL COMPANY, et al., Appellants.

(Submitted October 18, 1887; decided October 25, 1887.)

George A. Black for appellants.

Flamen B. Candler and *Mitchell L. Erlanger* for respondents.

Agree to affirm, with leave to apply to the court for leave to answer.

All concur; no opinion.

Order affirmed.

In the Matter of the Application of the NIAGARA FALLS AND
WHIRLPOOL RAILWAY COMPANY to Acquire Lands.

(Argued October 18, 1887; decided October 25, 1887.)

John L. Romer for appellant.

E. C. Sprague for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

THOMAS M. KING et al., Respondents, v. REON BARNES et al.,
Appellants.

(Argued October 18, 1887; decided October 25, 1887.)

Noah Davis for appellants.

W. W. MacFarland for respondents.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JENNIE E. WELLS, Respondent, v. HENRY H. WELLS,
Appellant.

(Argued October 18, 1887; decided October 25, 1887.)

M. A. Whitney for appellant.

Dilworth M. Silver for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

In the Matter of the Application of ERASTUS H. MUNSON for
the Appointment of Commissioners, etc.

(Argued October 18, 1887; decided October 25, 1887.)

D. J. Dean for appellant.

John C. Shaw for respondent.

Agree to affirm order on opinions of DANIELS and BARRETT,
JJ., in court below.

All concur.

Order affirmed.

AMANDA C. PUGSLEY, Respondent, v. PERRIN H. SUMNER et al.,
Appellants.

(Argued October 18, 1887; decided October 25, 1887.)

Matthew Daly for appellants.

T. Mitchell Tyng for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JULIUS FORTSMANN et al., Respondents, v. RUTH A. SHULTING,
Administratrix, et al., Appellants.

(Argued October 18, 1887; decided October 25, 1887.)

THIS was a motion to dismiss the appeal herein on the ground that the time for appealing had expired when notice was served.

The following is the *mem.* handed down:

"The notice of the order and its entry did not show by indorsement or otherwise the office address or place of business of the attorney serving it, and was, therefore, ineffectual to limit the time of appeal. (*Kelly v. Sheehan*, 76 N. Y. 325; *Bockes v. Hathorn*, 78 id. 222.)

"The motion to dismiss the appeal should, therefore, be denied, but without costs."

Matthew Hale for motion.

Nathaniel C. Moak opposed

Per Curiam mem. for denial of motion.

All concur.

Motion denied.

THOMAS M. KING et al., Respondents, v. REON BARNES et al.,
Appellants.

107	645
127	688
107	645
162	266

An appeal may not be taken to this court from an interlocutory judgment. (Code of Civ. Pro., §§ 190, 191.)

A judgment which, although it finally determines certain matters in controversy, orders an accounting before a referee, is an interlocutory judgment.

An order of General Term reversing an order made on trial which denied a motion to amend the complaint, and granting the amendment, when the amendment does not virtually change the plaintiffs' claim, is in the discretion of the court and is not reviewable here. (Code, § 723.)

The judgment of the General Term herein ordered that certain shares of stock should be delivered by one of the defendants, who held them as depository or custodian, to a referee appointed by the judgment. On appeal by defendants to this court they gave the security required to perfect the appeal. (Code, § 1326.) They then moved that the custodian be required to deliver the stock to the referee, which was granted, and the stock was so delivered. On motion of certain of the defendants, plaintiffs proceedings on the judgment were stayed until the hearing and decision of said appeal; that order was reversed by the General Term. *Held*, that the General Term order was not reviewable here; that if the proceedings were in fact stayed by the Code (§ 1326), the appellants were not entitled as a matter of right to an order, but it was in the discretion of the court, and its determination was not reviewable here.

(Argued October 18, 1887; decided October 25, 1887.)

THREE appeals and three motions in this action were argued and disposed of together. As to the appeals the following is the *mem.* of the opinion:

"*First.* The judgment of the Special Term entered on the 2d day of August, 1886, was an interlocutory judgment. It finally determined certain matters in controversy between the parties, but it ordered an accounting between them and appointed a referee for that purpose; and final judgment could not be entered until the accounting was had and report made. From that judgment the defendant, Barnes, appealed to the General Term, and he also served notice of a motion at the General Term under section 1001 of the Code for a new trial upon the exceptions. The motion and the appeal came on to be heard at the General Term at the same time and the motion was denied and the judgment was modified. But the

modification of the judgment in no way affected its character as an interlocutory judgment. The accounting between the parties was still to be had and its scope was enlarged and all questions as to costs and expenses of the reference, as to the distribution by the referee of moneys which should come into his hands under the judgment, and as to the satisfaction of a certain mortgage for \$250,000, were reserved and thus there was to be further judicial action. From the last named judgment Barnes and certain of the other defendants appealed to this court, and Barnes also appealed to this court from the order of the General Term which denied his motion for a new trial. The plaintiffs now move to dismiss the appeal to this court from the interlocutory judgment as not authorized. The contention of the appellants is that it is final and not interlocutory. As we have come to the conclusion that it is interlocutory the appeal therefrom to this court is not authorized by the Code, and it must be dismissed with costs.

"Second. At the trial the plaintiffs made a motion to amend their complaint by inserting therein certain additional allegations. The motion was denied and a formal order denying it was entered. From that order the plaintiffs appealed to the General Term, and it reversed the order and allowed the amendment. The amendment did not substantially change the claim of the plaintiffs, and it was therefore within the discretion of the court to grant it under section 723 of the Code. From the order of the General Term certain of defendants appealed to this court. A motion is now made to dismiss the appeal. As the General Term had power in its discretion to grant the amendment, its order is not appealable to this court, and the appeal must be dismissed, with costs.

"Third. The judgment of the General Term ordered that certain shares of the capital stock of the New York Transit and Terminal Company, should be delivered by one of the defendants in whose possession it was as a mere depositary to the referee appointed by the judgment to be disposed of by him as directed in the judgment. Upon the appeal of the defendants from the judgment of the General Term to this court they gave the security requisite to perfect the appeal under section 1326 of the Code. They then made a motion

that the depositary or custodian of the stock should in pursuance of the judgment be required to deliver the stock to the referee, and that motion was granted and the stock was so delivered. Certain of the defendants then made a motion that the plaintiffs' proceedings upon the judgment be stayed until the hearing and decision of their appeal to this court, which was granted. From that order the plaintiffs appealed to the General Term and there the order was reversed. From the order of reversal the defendants appealed to this court. They claim that the proceedings were stayed under section 1328 of the Code which provides as follows: 'If the appeal is taken from a judgment or order directing the assignment or delivery of a document, or of personal property, it does not stay the execution of the judgment or order until the thing directed to be assigned or delivered is brought into the court below, or placed in the custody of an officer or receiver designated by that court; or the appellant gives a written undertaking as prescribed in the next section.' It is not needful now for us to determine whether the proceedings are, as claimed by the appellants, stayed under this section; for if they are, the appellants are yet not entitled as matter of right from the court to an order staying the proceedings. Whether the court below would grant such an order rested in its discretion, and that discretion is not reviewable here. If the appellants claim that they have an absolute statutory stay, they may move to set aside or vacate any proceedings taken in violation of the stay or treat such proceedings as void, and thus their right to a stay and the construction and effect of the section quoted can be brought before the courts for construction and determination. The appeal should, therefore, be dismissed with costs."

Noah Davis for appellants.

W. W. MacFarland for respondents.

EARL, J., reads *mem.* disposing of the matters as follows:

1st. Appeal from General Term order, affirming interlocutory judgment, dismissed.

2d. Appeal from General Term order, reversing order of trial court and allowing amendment of complaint, dismissed.

3d. Appeal from General Term order, denying stay of proceedings, dismissed.

4th. Motion to amend return denied.

5th. Motion to consolidate appeals denied.

6th. Motion to stay proceedings denied

All concur.

Ordered accordingly.

MOSES P. HALL et al., Appellants, v. ABRAM MILLER,
Respondent.

(Submitted October 13, 1887; decided October 28, 1887.)

D. H. Bolles and Thomas Storrs for appellants.

J. R. Jewell for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

SAMUEL D. COYKENDALL et al., Respondents, v. WILLIAM
VOORHIS et al., Appellants.

(Argued October 13, 1887; decided October 28, 1887.)

Samuel J. Crooks for appellants.

R. D. Benedict for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ALPHONZO J. ALDRICH, Respondent, *v.* THE HOME INSURANCE
COMPANY, Appellant.

(Argued October 18, 1887; decided October 28, 1887.)

I. N. Ames, for appellant.

Daggett & Norton for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

HORACE B. CLAFLIN et al., Respondents, *v.* WESLEY MILSPAWE
et al., Appellants.

(Argued October 18, 1887; decided October 28, 1887.)

A. Hazeltine for appellants.

A. C. Wade for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ELLEN URQUHART, Respondent, *v.* CITY OF OGDENSBURGH,
Appellant.

(Argued March 18, 1887; decided November 29, 1887.)

Edward C. James for appellant.

Leslie W. Russell for respondent.

Agree to affirm; no opinion.

All concur, except EARL, FINCH and PECKHAM, JJ., dis-
senting.

Judgment affirmed.

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SALLY M. JEFFERS et al., Appellants, v. ROBERT N. JEFFERS,
Respondent.

A water-course, as defined in the law, means a living stream with defined banks and channel, not necessarily running all of the time, but fed from other and more permanent sources than mere surface water.

Natural depressions in land to which the surface water from adjoining lands naturally flows are not thereby made water-courses in the legal and technical sense of the word.

(Submitted October 13, 1887; decided November 29, 1887.)

THIS action was brought to restrain defendant from discharging surface waters collected on his lands through an artificial ditch or drain, which this complaint alleged he had dug for that purpose upon plaintiff's lands, and to recover damages.

The court found, in substance, the following facts :

"The parties are adjoining proprietors, the plaintiffs' farm lying north and defendant's south of the center of a certain highway.

"There is a sluice across this highway on the lands of the parties, through which there is an old natural channel and water-course for the flow of waters from the defendant's land at the south on to the plaintiffs' lands, and thence by a ditch and natural way across the lands of plaintiffs and over one or two other owners northerly, and easterly into a ditch called the "Sodus Ditch," which drains this section of the county into Sodus Bay on Lake Ontario.

"At the south end of this sluice and on the defendant's land there is a small pond, hole or depression of land in which the waters accumulate before running over and through said sluice. From this pond or depression there is a water-course or channel ascending gradually through a hollow or ravine on the defendant's land, southerly, a distance of four hundred and eighty feet to another sluice in a stone fence, running east and west, through which sluice and into the channel below there has always been a flow and escape of the surface waters falling or collecting upon the defendant's land south of said stone wall for a distance of about twenty rods, at which distance south of

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said stone wall, and running east and west, nearly parallel with stone wall, is a ridge or elevation of ground, forming a divide or water-shed, south of which the surface waters flow southerly and into Clyde river, and north of which ridge or elevation the surface waters find their way by a slight descent into and through the sluice under said stone wall, and thence into the ravine or water-way aforesaid, and northerly through the same, and thence into the pond through the said sluice in the highway, and on to and in and through an old water-course over the plaintiffs' lands."

"The court further found that between the stone wall and the ridge was a depression in the soil, usually dry in dry weather, but which in times of heavy rains filled with surface water from the adjacent lands, and the overflow found its way into the sluice by the stone wall down the ravine and across the highway on to plaintiff's land; that defendant dug a ditch from the ravine or water-way to said depression, which drained off the surface waters and emptied them into 'the open water channel' whence they flowed northerly into the pond, and after filling the same thence northerly through the sluice across the highway into 'an open ditch and water-course which has existed on plaintiff's land for the flow of surface waters for a period of time immemorial.'"

Further facts are stated in the opinion, which is given in full.

"The principal force of the appellants' argument is directed to the point that there was no evidence of the existence of a water-course upon the defendant's land, into which his ditches drained, and so the finding of the trial court to that effect was error. The argument would be irresistible if the finding meant or was intended to mean that there existed on defendant's land a water-course as defined in the law. That means a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water. (*Barkley v. Wilcox*, 86 N. Y. 140, 144.) There was no proof in the case of the existence of such a stream. Everybody agrees that all the water running over defendant's premises was surface water and the product of rains or melting snow. But we do not so under-

stand the findings excepted to. The learned judge describes a channel or water-course formed by a natural depression of the land, but expressly says that it conducted nothing but surface waters. He speaks of it again as a 'water way,' and in no respect finds that this channel or depression was a water-course in its legal and technical meaning. The exception, therefore, was not well taken.

"But upon the finding thus understood the appellants claim that they should have recovered, and that the judgment for the defendant was erroneous. In considering this question it is needed that we understand the issues presented and the course of the trial. The plaintiffs' cause of action was distinctly and definitely stated in their complaint. They alleged that a ridge of high ground runs east and west across defendant's farm, and north of the swamp outlet and basin to which the new ditches ran, and such that all surface waters south of the barrier naturally flowed to the south or remained stagnant and evaporated, and none of them flowed north toward plaintiffs' farm, or could so flow, except by the aid of artificial changes in the surface of the ground; that this protecting ridge or plateau was about twenty rods south from plaintiffs' line; and that the defendant cut his ditch through this ridge and thus turned upon them water which never before ran that way. The defendant denied that he had cut through any such ridge or brought down upon his neighbors a new and unaccustomed drainage, and the issue thus framed was the issue tried and to which the findings were directed. The plaintiffs made no claim in their pleading that the defendant's ditch increased the natural and usual flow over their land, and so they were injured, but claimed damages for a diversion of waters upon them which naturally ran elsewhere. They obtained a temporary injunction. The affidavit filed for that purpose states the case exactly as does the complaint, and seeks to shut off a foreign and artificial drainage. A perusal of the plaintiffs' proofs shows that they were confined to the issues pleaded. That evidence established that the surface water upon some part of defendant's land had always drained to the north, crossing the highway in a sluice which had long been maintained, thence following a ditch across plaintiffs' land and that

If their neighbors, until it reached the Sodus ditch, described as the drainage channel for the waters in that region. There was no direct or specific proof that the defendant's ditch increased the normal flow of surface water over the plaintiffs' land, or that the faint trace of damage to their wheat was due to such increase, or had not equally occurred in former years. The plaintiffs' proposed findings follow the line of the issues, and ask the court to determine that but for the cutting through the ridge or plateau none of the swamp or basin waters would have found their way to plaintiffs' lands; that the defendant diverted them into plaintiffs' ditch and these waters occasioned the injury. The trial judge decided these issues in favor of defendant and with abundant evidence to sustain his conclusion. He found that the surface waters complained of had long flowed to the north following a natural depression of the ground, and more or less found their way through the highway sluice into plaintiffs' ditch; that some water from defendant's land had always flowed that way; and refused to find that any ridge had been cut through, or any new drainage area had been added to the natural flow. The court did find that defendant's drain had increased the natural flow, but described it as a slight increase, and found that it had done the plaintiffs' no substantial or material damage. These findings are conclusive. There was no cause of action alleged for an increase of the natural flow, and if it existed, the sufficient answer is that it did no damage. There may be still another answer founded on the circumstances of the case, but it is unnecessary to go further.

"We find no error in the judgment, and it should be affirmed, with costs."

De L. Stow for appellants.

C. H. Roys for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

MARTHA ALBERT, Respondent, v. THE PRESIDENT, MANAGERS
AND COMPANY OF THE DELAWARE AND HUDSON CANAL
COMPANY, Appellant.

(Argued October 14, 1887; decided November 29, 1887.)

Hamilton Harris for appellant.

Clarence L. Barber for respondent.

Agree to affirm; no opinion.

All concur except PECKHAM, J., not sitting.

Judgment affirmed.

JOHN GIESE, Respondent, v. BENJAMIN J. HALL, Appellant.

(Argued October 14, 1887; decided November 29, 1887.)

William W. Goodrich for appellant.

Stephen B. Jacobs for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE DISCOUNT AND DEPOSIT BANK OF CLARION, Respondent, v.
SAMUEL F. OOSTERHOUDT et al., Executors, etc., Appellants.

(Argued October 14, 1887; decided November 29, 1887.)

J. H. Waring for appellants.

C. S. Cary for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

ISABELLA SMITH, Appellant, v. THE CITY OF BROOKLYN,
Respondent.

(Argued October 14, 1887; decided November 29, 1887.)

Patrick Keady for appellant.

Almet F. Jenks for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

WILLIAM H. ENSIGN et al., Appellants, v. JOHN L. MCKINNEY
et al., Respondents.

THIS case presented similar questions and was argued and
decided with *Ensign v. Barse* (*ante* p. 329.)

In the Matter of the Judicial Settlement of the Accounts of
LAWSON A. LONG, Administrator, etc.

(Argued October 18, 1887; decided November 29, 1887.)

Frank R. Perkins for appellant.

George Gorham for respondent.

Agree to affirm ; no opinion.

All concur except EARL and DANFORTH, JJ., dissenting.

Judgment affirmed.

MARVIN S. ROBINSON, Respondent, v. ANDREW H. FRANK,
Appellant.

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(Submitted October 18, 1887; decided November 29, 1887.)

DEFENDANT contracted to sell and deliver to one Frank,
plaintiff's assignor, 1,500 drag sawing machines. The con-
tract contained a provision that in case defendant should fail

to manufacture and deliver the machines as provided for and should remain in default for thirty days after written notice, then that Frank, without further notice, might sue and recover of plaintiff four dollars for every machine not delivered. Defendant delivered 100 machines under the contract, and then, as the trial court found, absolutely refused to manufacture and deliver any more.

This action was brought to recover pay for each machine not delivered. The defense was that the thirty days notice was not given as prescribed in the contract.

The following is the *mem.* of opinion :

"Very likely the defendant is right in his construction of the terms of the contract, and that the notices were required in conformity with his views of its requirements.

"We think, however, there was sufficient evidence upon which to base the finding of the trial judge, that the defendant ceased and refused to manufacture the machines under the contract, and so notified the plaintiff or his agent. The refusal was absolute and total, and it is not pretended that defendant ever withdrew it. It was ample excuse and justification to the plaintiff for his omission to make any further demand or to serve any other notices than the last one, which it is admitted or proved that he did serve. (*Shaw v. Republic Life Insurance Co.*, 69 N. Y. 286.)

"There are no merits in the appeal, and the judgment should be affirmed, with costs."

Rogers, Locke & Milburn for appellant.

Spencer Clinton for respondent.

Per Curiam mem. for affirmance.

All concur.

Judgment affirmed.

JAMES F. BROOKS, Respondent v. THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.

(Argued October 18, 1887; decided November 29, 1887.)

E. C. Sprague, for appellant.

Amasa J. Parker, for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

GEORGE STREAT, Appellant, v. VICTOR HENRY ROTHSCHILD
et al., Respondents.

(Argued October 20, 1887; decided November 29, 1887.)

William King Hall for appellant.

S. P. Nash for respondents.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN OLSSON, Respondent, v. THOMAS WALSH et al., Appellants.

(Argued October 21, 1887; decided November 29, 1887.)

J. C. Shaw for appellants.

J. Edward Swanstrom for respondent.

Agree to affirm order and for judgment absolute against
appellants on stipulation ; no opinion.

All concur.

Order affirmed and judgment accordingly.

AMERICAN EXCHANGE IN EUROPE (Limited), Appellant, v.
WILLIAM H. ROBERTSON, Respondent.

(Argued October 21, 1887; decided November 29, 1887.)

Alfred Jaretzki for appellant.

S. P. Nash for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

STEPHEN SWEET, as Survivor, etc., Respondent, v. ALEXANDER
TAYLOR, Appellant.

(Submitted October 21, 1887; decided November 29, 1887.)

H. H. Morse for appellant.

George H. Decker for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JULIUS CATLIN, Jr., et. al., Appellants, v. GEORGE FREDERICK
VIETOR et al., Respondents.

(Argued October 21, 1887; decided November 29, 1887.)

Aaron Pennington Whitehead for appellants.

Charles M. Da Costa for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOHN CONSALUS, Respondent, *v.* ISAAC McCONIHE et al.,
Impleaded, etc., Appellants.

(Argued October 24, 1887; decided November 29, 1887.)

Charles E. Patterson and *Orin Gambell* for appellants.

E. F. Bullard for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JOSEPH H. BERRY et al., Respondents, *v.* ANDREW BROWN,
Appellant.

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It seems an agreement by a third person with an out-going member of a firm to relieve him from and indemnify him against the firm debts, where no consideration passed to the promissor, cannot be enforced against him by a creditor of the firm.

It seems, also, such an oral agreement is void under the statute of frauds.

(Argued October 25, 1887; decided November 29, 1887.)

THE following is the *mem.* of opinion in this action :

"This action was brought by the plaintiffs, who held claims against the firm of Zeiss & Company, which firm was composed of Zeiss and Maria A. Brown, the wife of the defendant, to recover upon such claims against the defendant on the ground that he had assumed the payment of them. It was alleged in the complaint that on or about the 8th day of January, 1881, Zeiss sold all his interest in the firm property to the defendant and that as part of the consideration of the sale, the defendant, agreed to pay all the firm debts, including the claims of the plaintiffs. The defendant put in issue all the material allegations of the complaint.

"Upon the trial it appeared that Zeiss and Mrs. Brown entered into co-partnership for the purpose of manufacturing and selling varnish at Windsor, in Canada, for the term of three years commencing July 1, 1878, and ending July 1, 1881;

that Mrs. Brown contributed her own capital to the firm; that the defendant had no interest therein, but that he held a power of attorney under seal to act for his wife. The firm business was conducted until January, 1881, when the defendant opened negotiations with Zeiss for the sale by him of his interest in the firm and his retirement therefrom. The negotiations terminated in the execution of a written agreement dated January 11, 1881, by which Zeiss sold out all his interest in the firm business and assets to Mrs. Brown, she agreeing as the consideration of the sale to her to pay him the sum of \$300, to allow him to retain \$700 which he had wrongfully taken of the funds of the firm, and to assume and pay all the debts of the firm. The agreement was under seal between Mrs. Brown of the first part, and Zeiss of the second part, and it was first signed by 'Maria A. Brown for Andrew Brown attorney in fact,' and then by 'W. Zeiss,' and it was acknowledged by the defendant as attorney for his wife and by Zeiss before a notary public. It is not alleged that there was any fraud in the draft or execution of this agreement. It was read over to Zeiss and he testified that he understood it. He made objections to some of the language used in it and looked it over himself. The defendant and the attorney who drew the agreement testified that it expressed truly the whole agreement between the parties. Yet Zeiss was permitted to testify that he did not understand it as written, and that he understood he was making the sale to Kruger & Company, although that name did not appear in the writing and was not mentioned at the time the writing was signed. But he did not testify that he made the sale to the defendant or that he understood that he made it to him. He testified, however, that Kruger & Company, to whom he supposed he was making the sale, were to assume and pay the firm debts. It is clear from his evidence that he understood and that it was agreed that the purchaser, whoever he was, was to assume and pay the firm debts. But he also testified that the defendant said during the negotiations and before the execution of the written agreement, that he, Zeiss, 'should be relieved from all indebtedness of the firm;' that he, the defendant, 'would see that the creditors are paid;' that it was the agreement that he

'was to pay the debts.' It is left uncertain which of these phrases, if any of them, was used by the defendant. It is not a fair inference from the situation or from anything said or done during the negotiations that the defendant, who had no personal interest in the firm, who was not under any liability for the firm debts, and was not the purchaser of the interest of Zeiss in the firm assets, meant or was understood by Zeiss to bind himself personally for the payment of all the firm debts. He was present at the negotiation as the attorney of his wife, and was acting for her, and the fair construction of all the language imputed to him is that he was speaking and acting for her when he gave the assurance that all the debts should be paid, and that assurance was carried out and embodied in the written agreement. By this construction the language imputed to the defendant is brought into harmony with the written agreement, and with the undisputed facts surrounding and attending upon its execution. The burden was upon the plaintiffs to show that the defendant agreed for himself to be personally bound to pay the firm debts, and a careful scrutiny of the record satisfies us that there is scarcely a scintilla of evidence to prove such an agreement, and the jury should not have been permitted to find it.

"But suppose the plaintiffs are right in their contention that the defendant used the language imputed to him by Zeiss and above quoted, meaning thereby to bind himself personally, then we think it cannot be said that his agreement was made for the benefit of the plaintiffs. It was an agreement for the benefit of Zeiss to relieve him from and indemnify him against the debts of the firm, with no intention to secure any benefit to the firm creditors; and as the sale was not made to the defendant and no consideration whatever passed to him, these plaintiffs, strangers to the agreement, cannot enforce it against him. (*Merrill v. Green*, 55 N. Y. 270; *Simson v. Brown*, 68 id. 355.)

"But the plaintiffs have to encounter a still further difficulty. The agreement imputed to the defendant is invalid under the statute of frauds, because not in writing. As before stated the sale was not to the defendant. He took no

interest in the property conveyed, and received no benefit from it, as all the firm property was subsequently sold and its proceeds applied upon firm debts. He was not antecedently liable for the payment of the firm debts and had no personal interest in their payment. The liability of Zeiss for the debts was not extinguished, but remained in full force unaffected as between him and the firm creditors. The defendant's promise, therefore, assuming that it was made, was to answer for the debts of Zeiss, or for the default of Kruger & Company or for the default of Mrs. Brown, and in either event it was invalid under the statute of frauds. It matters not that there was a consideration of harm to Zeiss from his transfer of the property; there was no consideration of benefit to the defendant. For the conclusion we thus reach the cases of *Mallory v. Gillett* (21 N. Y. 412), and *Belknap v. Bender* (75 id. 446), are ample authorities.

"The plaintiffs should therefore have been nonsuited, and hence the judgment should be reversed and a new trial granted, costs to abide event."

Joseph H. Choate and *James F. Gluck* for appellant.

Spencer Clinton for respondents.

EARL, J., reads for reversal and new trial.

All concur.

Judgment reversed.

LOUIS J. SIMONIN, Respondent, *v.* THE NEW YORK, LAKE
ERIE AND WESTERN RAILROAD COMPANY, Appellant.

(Submitted October 25, 1887; decided November 29, 1887.)

B. F. Tracy for appellant.

Charles J. Patterson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

MERCHANTS' LOAN AND TRUST COMPANY, Appellant, v. HENRY CLAIR, Respondent.

(Argued October 25, 1887; decided November 29, 1887.)

THIS action was brought by plaintiff, a corporation organized under the laws of New Jersey, upon a promissory note made by defendant.

The following is the *mem.* of opinion :

"The plaintiff, on the trial of this action, after making a *prima facie* case for a recovery instead of resting, seems to have unmade it. The suit was on a promissory note which was fully proved, together with the due incorporation of the plaintiff. Without pausing at this point and leaving the burden of the defense upon the defendant, the plaintiff proceeded to throw doubt upon his own case. He put in evidence an order of the Court of Chancery of New Jersey, in which state the plaintiff had been incorporated, appointing a receiver of the corporate property, founded upon a petition alleging the insolvency of the company, and that it had suspended business for want of funds. This order directed the receiver to collect and turn into money the assets of the corporation and pay the proceeds, not to it, but to the creditors of the company. This might have been an interlocutory order under the law of New Jersey, but for the apparent purpose of showing the foreign law which authorized the order, the plaintiff read in evidence a statute of New Jersey providing for the appointment of a receiver "when any corporation shall be dissolved." The only admissible inference from this proof was that the receiver had been appointed under the New Jersey law after or upon the dissolution of the corporation, and that the plaintiff had no longer a corporate existence. At this point the plaintiff rested and the defendant moved to dismiss the complaint. The plaintiff, with its attention drawn to the difficulty, instead of proving some other law under which the receiver had been appointed and consistent with the life of the corporation, stood upon the case as made and his complaint was dismissed. That seems to us to have been a correct decision.

"The whole argument for the plaintiff proceeds upon the assumption that the corporation had not been dissolved. That may have been the truth, but upon the evidence which the plaintiff himself gave, the inference is the other way.

"The judgment should be affirmed with costs."

John A. Mapes for appellant.

Delos McCurdy for respondent.

Per curiam mem. for affirmance.

All concur.

Judgment affirmed.

HENRY C. DART, Respondent, *v.* WILLIAM E. LAIMBEER,
Appellant.

(Argued October 25, 1887; decided November 29, 1887.)

THIS action was brought to recover damages alleged to have been sustained by reason of the breach of a copartnership agreement. The alleged agreement was for a copartnership for one year in the flour business, defendant to furnish the capital and plaintiff to manage the business. It appeared that the business was carried on under the agreement for about four months, when defendant refused to go any further with it, instructed the salesmen to sell no more goods, stopped deliveries and sold the machinery.

The following is the opinion:

"The defendant objects to the recovery in this action on two grounds: *First.* That there was not evidence sufficient to go to the jury to show that there would have been any profits from the business of the firm from March to the end of the year in case the partnership had not been dissolved. *Second.* That there was error in the reception of a copy of a letter written by defendant to one Perot.

"In regard to the first we think there was evidence sufficient to go to the jury upon the question of future profits. The plaintiff himself while on the stand swore that the business

of the firm went on from November up the time of the dissolution in March very prosperously — increasing ; that there were no signs of diminution ; that the trade was in town and out of town and that they had their salesmen out ; that the firm sold two classes of flour, called the barrel flour and the package flour, the former in the summer and the latter in the winter ; that for barrel flour the summer was the best season and the package flour sold best in the winter. He proved by another witness, who was a salesman and who went into the employ of the firm in February, 1880, that he sold the flour of the firm in Jersey City where he had a good trade ; that he started with one hundred and sixty stores, sold considerable and had a great deal more sold when in March the defendant told him to stop and said that he would not send out any more goods and that no more orders would be filled. The witness also stated that he had a considerable trade in barrel flour, and as the city trade fell off the country trade increased — just doubled, and that his trade was increasing, with a prospect that it would continue to increase during the year, and at that time the defendant stopped the business. The plaintiff also proved by another witness, who was in the employ of the firm, that the best part of the year for the business commences about September and lasts until about January, and then there is a slack for a while and then picks up again about the first of February and continues to be better until the summer. He further testified that there was no reason that he knew of why this business, if it had gone on, would not have been a good business from April to November, or why it would not have been a success from the time it stopped in March until the following November, and so far as he saw the plaintiff conducted the business properly.

“The plaintiff also produced and read in evidence what he claimed was a copy of a letter written by the defendant to a man named E. L. Perot, dated the 19th of April, 1880, in which letter he stated that the books of the firm showed a profit of four hundred and odd dollars per month ; that he was settling up the accounts and hoped it would prove what the books showed. The plaintiff also proved that on the first of January, after the concern had been in operation two

months, a statement of the affairs of the firm was made by the bookkeeper, and such statement was present at the time that the partners had a conversation in regard to the state of the business. This statement was then looked at and it was proved and not contradicted that it showed a profit for the two months of some \$1,600, and that the defendant stated, "that is doing very well indeed, that is satisfactory." Some conversation was had between the partners at that time in regard to what disposition should be made of the profits. It was understood that this \$1,600 of profit was based upon the condition of the firm, as shown by the books, in which the accounts due the firm and amounting to six or eight thousand dollars were regarded as assets to the full amount, and if those accounts were not all collected the amount of the profits would be reduced accordingly.

"This substantially was the character of the evidence given by the plaintiff for the purpose of furnishing a basis for the jury to come to a conclusion as to the amount of damages which he sustained by reason of a dissolution of the partnership before the time agreed upon.

"A motion for a nonsuit on the ground, among others, that no sufficient evidence had been given upon which to base any claim to recover for prospective or future profits, was denied by the court.

"The defendant, in order to meet this evidence, proved by an expert who had made an examination of the books (there being no substantial dispute but what the books had been properly and accurately kept), that when the statement was made of the condition of the concern on the 1st of January, 1880, after it had been in existence for two months, and which statement showed an apparent profit of \$1,600; that it appeared (as already stated) that such profit was based upon the assumption that the accounts which appeared as outstanding were all good and collectible. Another statement was made, as from the books, up to the 2d of March, 1880, in which it appeared that the profits for the two months from January to March, based upon the same assumption of the collectibility of the accounts, amounted to only ninety-seven dollars. The expert further testified from an examination of

the books that the entries therein, as they stood on the day he examined them and long after the dissolution of the company, disclosed a deficiency of \$2,665 as a result of the business of the firm during the time of its existence. This was based upon all the entries in the books containing a statement of all the business of every name and nature and all the receipts and disbursements. It would thus appear that after the dissolution of the firm, when the property of the firm was sold and the accounts were in course of collection, the result at the time when the balance was struck was as defendant stated above, viz., a loss instead of a profit upon the business done.

"The explanation as to how there could have been a profit of \$1,600 on the first of January, and of \$97 on the first of March for the two months immediately preceding, and yet when the firm was dissolved and proceedings taken to wind it up that a loss should be the result, is made to appear by the evidence on the part of the plaintiff. The proof on the part of the defendant simply showed that the accounts had not all been collected at the time when the expert witness examined the books. But there was no evidence that the accounts themselves were not against solvent debtors who would have paid if the business had continued. The plaintiff showed that by suddenly dissolving the firm and breaking up the business in March, after its existence of but four months, losses occurred to the firm on that account. It would seem that the business of the firm was made up of small accounts against a large number of customers, and that a sudden dissolution and going out of business had the effect upon their various customers of making them negligent in paying the firm debts, and the amounts in each case were too small to make it worth while to attempt to collect them by legal proceedings. Hence one source of loss on winding up the concern.

"It would seem also that there had been a loss upon the sale of the personal property of the firm, including the machinery, and quite large expenses had been incurred in fitting up the store which had gone into the machinery account, and in closing the firm business at the end of four months, the profits realized had not been sufficient to counter-

balance the loss upon the sale of the property of the firm and to make up the amount expended by way of repairs, etc., to the store. So that as a final result the firm sustained a loss instead of securing a profit from its four months business. This does not necessarily affect the correctness of the assumption of profit made in the statements of January and March, 1880. The loss on the sale of the firm's property and the amount expended for repairs, should have been offset against a year's profits instead of four months, and therefore but one-third of those amounts ought in any event to be charged against those assumed profits. Then again there is not any evidence that the accounts could not have been readily collected in case the business had gone on. And lastly, upon the evidence on the part of the plaintiff there was the fair prospect of the increase of business and a consequent increase of profits during the next eight months. All this evidence, we think, was quite sufficient to explain why upon the assumption of the accounts being good there should have been a profit in January and again in March appearing by the books, and yet upon an undue and premature winding up of the business of the firm there should subsequently appear to have been a loss instead of a profit upon the whole business.

"This evidence in relation to the firm having realized any profits from their business during the four months is only material as bearing upon the possibilities or probabilities of the same fortune attending it during the eight succeeding months. It is not as a measure of damages that the evidence is given, but only as a fact from which inferences might be drawn by the jury as to what was reasonable and probable, about the amount of profits to be realized from the business during the eight succeeding months had the firm continued business. If, as matter of fact, there had been a loss during those four months, if there were evidence satisfactorily explaining such loss and also showing an inherent probability or almost certainty of a change in the future, and that the succeeding months would have resulted in a business profit, the plaintiff would still have been entitled to a verdict.

"Upon the whole we think there was evidence sufficient to go to the jury upon the question of probability of profits

during the eight months unexpired at the time of the dissolution of the firm, and that the verdict of the jury should not be disturbed on that ground. The verdict shows that the parties entered into an agreement to continue as partners for one year, and that the firm was broken up and dissolved after four months by the act and fault of the defendant. Under such circumstances courts ought not to be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits. As was said in *Bagley v. Smith* (10 N. Y. 499), "it is the misconduct of the defendant which has rendered the inquiry necessary," and it may be added has also made it quite difficult. Within the rule as to prospective projects laid down in *Wakeman v. Wheeler, etc. Co.* (101 N. Y. 205), we think the plaintiff by his proof brought this case. Upon the second ground, viz., the admission of the Perot letter, we think there is no cause for a reversal of this judgment.

"Whether there was error or not in the admission of a copy of the letter, as claimed by the defendant's counsel, for the reason that a sufficient ground was not laid for the admission of secondary evidence of its contents, we think it perfectly plain that no harm could have resulted from its admission. We do not decide that it was error to admit it, but assuming error we say no harm could have been caused by it. The letter simply stated that the books showed a profit of four hundred and odd dollars per month. The books were subsequently put in evidence by the defendant and evidence was given on his part proving that the books did show a profit of that average amount per month, upon the assumption already stated of the collectibility of the accounts, and of course without considering the possible loss arising from a sale of the firm's property on a premature winding up of the concern. It is evident that the defendant in writing the letter understood exactly that the profit was based wholly upon this assumption of collectibility, which fact explains the expression used in the letter, 'I am settling up the accounts and hope it will prove what the books show.' Any one reading it would see that the profits appearing from the books were based upon the assumption that the accounts should prove collectible.

"There is nothing else material in the letter. The expression used therein that 'one thing is sure the capital is always intact' is obviously but the expression of an opinion, and is followed up by the further statement that 'a personal investigation of the whole matter would I think be more satisfactory to you.'

"Neither of the grounds argued by the defendant's counsel is sufficient upon which to reverse the judgment, and it should therefore be affirmed with costs."

Edward S. Rapallo for appellant.

George W. Wingate for respondent.

PECKHAM, J., reads for affirmance.

All concur.

Judgment affirmed.

ANNIE GRAFF, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued October 25, 1887; decided November 29, 1887.)

Edward Harris for appellant.

William Henry Davis for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN N. GRAVILLE, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued October 28, 1887; decided November 29, 1887.)

C. D. Prescott for appellant.

Louis Marshall for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOHN F. HIRSCH, Respondent, *v.* THE CITY OF BUFFALO,
Appellant.

(Argued October 24, 1887; decided December 6, 1887.)

E. C. Hawks for appellant.

Adelbert Moot for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
CHARLES F. MEYERS, Appellant.

(Argued October 26, 1887; decided December 6, 1887.)

A. R. Dyett for appellant.

McKenzie Semple for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JULIA C. CHAPIN, Respondent, *v.* HOPKINS N. MELOON et al.,
Appellants.

(Argued October 26, 1887, decided December 6, 1887.)

Louis Hasbrouck for appellants.

Daniel Magone for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed.

JOSEPHINE DECATUR, as Executrix, etc., Appellant, *v.* JOHN
E. GOODRICH, Respondent.

(Argued November 29, 1887; decided December 6, 1887.)

A. T. Clearwater for appellant.

Wm. Lounsbury for respondent.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

GEORGE W. WINGATE, Respondent, *v.* LIPSEY GAS BURNER
COMPANY, Respondent, E. P. GLEASON MANUFACTURING
COMPANY, Appellant.

(Argued November 29, 1887; decided December 6, 1887.)

Daniel S. Remsen for appellant.

Augustus A. Levey for respondents.

Agree to dismiss appeal ; no opinion.

All concur.

Appeal dismissed.

In the Matter of JANE A. PORTER, a Lunatic.

(Argued November 29, 1887; decided December 6, 1887.)

D. D. McKoon for appellant.

George Gorham for respondent.

Agree to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

JOHN BRADY, Respondent, *v.* THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK, Appellant.

BERNARD BRADY, Respondent, *v.* SAME, Appellant

(Argued November 29, 1887; decided December 6, 1887.)

Roscoe Conkling for appellant.

L. Laflin Kellogg for respondents.

Agree to dismiss; no opinion.

All concur.

Appeals dismissed.

IGNATZ THALHEIMER, *v.* FERDINAND HAYS et al.

SALIE FRANKEL, *v.* FERDINAND HAYS et al.

YETTE THALHEIMER, *v.* FERDINAND HAYS et al.

SUSSELIA HAYS, *v.* FERDINAND HAYS et al., ROBERT B.
WICKES, Receiver, etc., Appellant.

(Argued November 29, 1887; decided December 6, 1887.)

William N. Cogswell for appellant.

Garlock & Beach for respondent.

Agree to affirm; no opinion.

All concur.

Orders affirmed.

IGNATZ OESTERMEICHER, Appellant, *v.* THOMAS A. RAISBECK,
Respondent.

(Argued November 29, 1887; decided December 6, 1887.)

W. R. Spooner for motion.

Wehle & Jordan opposed.

Agree to grant motion to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

WILLIAM F. PARKS, Appellant, *v.* MARGAURIET A. MURRAY,
Impleaded, etc., Respondent.

(Argued November 29, 1887; decided December 6, 1887.)

George S. Wilkes for motion.

James Kearney opposed.

Agree to grant motion to dismiss appeal; no opinion.

All concur.

Appeal dismissed.

LOUIS WINDMULLER et al., Respondents, *v.* THOMAS J. POPE
et al., Appellants.

Where, before the time of delivery fixed by a contract of sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods, and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time and is entitled to bring an action immediately for the breach without tendering delivery; it is not necessary for him to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract, after the vendor has acted upon it, and, by sale of the goods to other parties, changed his position.

The ordinary rule of damages in such an action is the difference between the contract price and the market value of the property at the time and place of delivery.

(Argued October 24, 1887; decided December 6, 1887.)

107c 674

130 358

107c 674

137 486

107c 674

148 384

107c 674

159 877

THIS was an action to recover damages for alleged breach of a contract to purchase a quantity of iron.

In January, 1880, the parties entered into a contract for the sale by plaintiffs and purchase by defendants of "about twelve hundred tons old iron, Vignol rails, for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia or Baltimore, at any time from May 1 to July 15, 1880, at thirty-five dollars per ton, * * * deliverable in vessels at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, or any part of it, and advised that plaintiffs better stop at once in attempting to carry out the contract. Plaintiffs thereupon sold the iron abroad which they had purchased to carry out the contract.

The following is an extract from the opinion :

"We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract ; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to other parties, changed their position. (*Dillon v. Anderson*, 43 N. Y. 231 ; *Howard v. Daly*, 61 id. 362 ; *Ferris v. Spooner*, 102 id. 12 ; *Hochster v. De La Tour*, 2 El. & Bl. 678 ; *Cort v. Ambergate, etc., Railway Co.*, 17 Ad. & El. 127 ; *Crabtree v. Messermoth*, 19 Ia. 179 ; Benjamin on Sales, §§ 567, 568.)

"The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract-price and the market value of the property at the time and place of

delivery. (*Dana v. Fiedler*, 12 N. Y. 40; *Dustan v. McAndrew*, 44 id. 72; *Cohen v. Platt*, 69 id. 348.)”

Carlisle Norwood, Jr., and *W. W. Niles*, for appellants.

Bernard Roelker and *Cephas Brainerd*, for respondents.

Per Curiam opinion for affirmance.

All concur.

Judgment affirmed.

EDGAR B. BANKS, Appellant, *v.* SAM H. MILLER et al.,
Respondents.

This case presented the same question and was argued and decided with *Rockafellow v. Miller*, *ante*, p. 507.

THE CITY OF POUGHKEEPSIE, Respondent, *v.* ABRAHAM WILTSIE,
Appellant.

(Argued November 28, 1887; decided December 18, 1887.)

Homer A Nelson for appellant.

C. B. Herrick for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

JAMES H. HOOKER, Respondent, *v.* THE CITY OF ROCHESTER,
Appellant.

(Argued November 30, 1887; decided December 20, 1887.)

Ivan Powers for appellant.

Eugene Van Voorhis for respondent.

Agree to affirm ; no opinion.

All concur.

Judgment affirmed

FRANCIS L. HAIGHT, Respondent, *v.* THE BOARD OF SUPERVISORS OF SARATOGA COUNTY, Appellant.

(Argued December 2, 1887; decided December 20, 1887.)

C. S. Lester for appellant.

L. B. Pike for respondent.

Agree to affirm with modification reducing interest to six per cent from January 1, 1880 ; no opinion.

All concur, except PECKHAM, J., not sitting.

Ordered accordingly.

SUSAN PETTIT, Respondent, *v.* ASA PETTIT, Appellant.

107	677
116	649
107	677
118	14
118	17

Where a married couple had separated, and pending an action for limited divorce brought by the wife against the husband, a settlement was agreed upon between them, and a contract entered into in pursuance thereof, to the effect that the property of the husband should be sold, and after payment of his debts, one-third of the proceeds remaining should be paid to the wife, and that they should live separate. *Held*, that the contract was valid, and an action was maintainable to recover the portion of the proceeds so agreed to be paid to her.

(Argued December 5, 1887; decided December 20, 1887.)

THE following is the opinion in this action in full :

"The plaintiff and defendant are husband and wife, and at the ripe ages of eighty and seventy-three, and after a married life of almost half a century, have quarrelled and separated. The wife brought an action for a limited divorce upon the ground of cruel and inhuman treatment. Pending the trial a settlement was agreed upon to enforce which the present action is brought. The substance of that

agreement was that the property, real and personal, of the husband, should be sold and converted into money, and after paying his debts to an amount not exceeding \$600 one-third of the balance remaining should be paid over to the wife and the parties should live separate. The property was advertised for sale as agreed, but before the sale the defendant, through his counsel, demanded the execution by the plaintiff of an agreement to be executed also by two of the sons, expressly indemnifying the defendant against any liability for the support of the wife already incurred or that might thereafter accrue. His written contract gave him no such right, and failed to justify any such demand. The wife refused to sign unless the sons did, and they peremptorily declined. The husband indicated a purpose not to carry out his agreement unless the proposed indemnity was executed. In this condition of affairs the sale took place and the land was purchased by one Schreiber for \$5,160, and the sale of the personal property brought the net proceeds up to \$5,701, and no more. A contract of sale by husband and wife was executed by them to Schreiber, but when the day for delivering the deed came around the wife refused to sign, except upon receiving her share of the money on the spot. To this she was not entitled, but her unfounded demand grew out of and was occasioned by the husband's unfounded demand of an indemnity. Schreiber brought a suit to compel a delivery of his deed. Pending that, the new differences were settled by a supplemental agreement that the wife should sign the deed and the husband deposit \$1,400 to abide the event of the present action, which was expected to be commenced. The costs in the Schreiber suit seem to have been satisfactorily arranged by an agreement with the wife's attorney to pay them out of any costs recovered by the wife in this action. The deed was accordingly signed and the money deposited. The complaint in the present action sets out the original written agreement, alleges full performance on the part of the wife, and demands performance by the husband to the extent of the one-third of the net proceeds. The latter by his answer raised a new issue, claiming that he signed the agreement under a mistake produced by the concealment of a material

fact by the plaintiff. He avers that he did not know of any claim against him for the previous support of his wife; that two of his sons had such a claim to the amount of \$1,000, and the wife knew it; that when the agreement was being made the question was asked what debts the defendant owed, and he answered \$600, and that amount was named in the agreement, the wife and sons concealing the fact of the existing claim for support.

"The difficulty with this defense is that it is unproved. It is not shown that at the date of the agreement the two sons had any such claim against their father in fact or that they were conscious of such a right, or that the wife knew it if it existed. No competent proof of any such facts was offered or given, and the requests to find prepared by the defendant's counsel to the number of fifteen, cover no such facts, and indeed do not allude at all to the defense of mistake. It was thus plainly abandoned on the trial and has no proof to support it. The defendant did not even establish that such a claim had been made upon him subsequent to the agreement.

"The questions remaining are as to the validity of the written contract and its force and effect. It is claimed to be against public policy because by its terms the wife agrees to live separate and apart from her husband. In the pending action for divorce, the plaintiff would have been entitled, if successful, to a decree of separation and a suitable allowance from the estate of her husband, for her support and maintenance. It is difficult to see how it could be in accord with public policy to award such relief, and yet against public policy for the husband to concede it in advance of the decree and as a compromise of the existing litigation. Public policy does not turn on the question whether the husband fights out the quarrel to final judgment. Where the separation exists as a fact and is not produced or occasioned by the contract, the consideration of the husband's agreement to pay is his release from liability for the support of his wife. (*Calkins v. Long*, 22 Barb. 97; *Mann v. Hulbert*, 38 Hun, 27; *Carpenter v. Osborn*, 102 N. Y. 552.) A further objection that the contract was first broken by plaintiff is answered by the fact already suggested that her

refusal to sign was induced by the unfounded demand of indemnity, and the further fact that she did finally perform and the defendant has had and accepted the full benefit of such performance.

"The judgment should be affirmed with costs."

Josiah T. Marean for appellant.

G. Storms Carpenter for respondent.

FINCH, J., reads for affirmance.

All concur.

Judgment affirmed.

107	680
116	302
107	680
145	661

ARBA BRIGGS, Appellant, v. JOHN LANGFORD et al.,
Respondents.

The defense of want of consideration is available against an assignee of a mortgage although he is a *bona fide* purchaser he stands in respect to the security in the place of the assignor

(Argued December 6 1887, decided December 20, 1887)

THIS action was brought to restrain the foreclosure by advertisement of a mortgage executed by one Day and wife to defendant Heath, and by him assigned to defendant Langford. Day conveyed the land to plaintiff by warranty deed, representing that it was free from all incumbrances.

The following is the *mem.* of opinion:

"We think that the trial court erred in overruling the offer of the plaintiff to prove that the mortgage was given for the purpose of defrauding the creditors of the mortgagor, and upon no other consideration. The plaintiff paid the full value of the land upon the assurance of Day that it was free from incumbrances. Day is dead and his estate is insolvent, and there is no available remedy on the covenants in the deed. If the mortgage was without consideration it could not be enforced against Day although it was given to cover up his property and defraud his creditors. (*Wearse v. Peirce*, 24

Pick. 141.) The defense of want of consideration is equally available against Langford, the assignee of the mortgage, as against Heath, the mortgagee, for he stands in respect to the security in place of his assignor; and even if he is a *bona fide* purchaser, he is not exempt from the defense of want of consideration. (Jones on Mortgages, § 843, and cases cited; *Bush v. Lathrop*, 22 N. Y. 535.)

"The plaintiff occupies a position quite as favorable at least as that of the mortgagor. He paid the full value of the land and upon the plainest principles of justice he is entitled to assail the validity of any pretended liens thereon. Upon the facts found it is difficult to resist the suspicion that this is an attempt to enforce a void mortgage, and, under cover of pretended transfers and assignments, to consummate a fraud upon the plaintiff. It is a case where all possible light should be thrown on the transaction.

"The judgment should be reversed and a new trial granted."

William H. Henderson for appellant.

Worthington Frothingham for respondents.

ANDREWS, J., reads for reversal and new trial.

All concur.

Judgment reversed.

DANIEL SMITH, as Administrator, etc., Respondent, v. ROBERT MEAGHAN et al., Appellants.

(Argued December 18, 1887; decided December 20, 1887.)

R. A. Parmenter for motion.

J. H. Clute opposed.

Agree to grant motion to dismiss appeal.

All concur; no opinion.

Appeal dismissed.

STEPHEN TABER *v.* MARIA BRUNDAGE et al., Appellants;
R. ELBRIDGE, Jr., Purchaser, Respondent.

(Argued December 13, 1887; decided December 20, 1887.)

J. T. Mariean for motion.

Chas. H. Luscomb opposed.

Agree to grant motion to dismiss appeal.

All concur; no opinion.

Appeal dismissed.

JANE GREER et al., Respondents, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued November 30, 1887; decided December 23, 1887.)

Matthew Hale for appellant.

Amasa J. Parker for respondents.

Agree to affirm on opinions below.

All concur; no opinion.

Judgment affirmed.

WILLIAM H. KIMBALL, Respondent, *v.* MARY LEONARD et al.,
Appellants.

(Argued December 7, 1887; decided December 23, 1887.)

E. M. Holbrook for appellants.

Nelson L. Robinson for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

EDWARD M. ROSS, Respondent, v. JOHN H. ROSS, Appellant.

(Argued December 7, 1887; decided December 23, 1887.)

Henry C. Place for appellant.

Edward P. Wilder for respondent.

Agree to affirm on case of *Allerton v. Allerton* (50 N. Y. 670).

All concur; no opinion.

Judgment affirmed.

JULIA H. HALPIN, Appellant, v. THOMAS C. TOWNSEND,
Respondent.

107b 683
187 150

(Argued December 7, 1887; decided December 23, 1887.)

Edward P. Wilder for appellant.

John Townshend for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

DANIEL GAVIN, Respondent, v. FERDINAND H. DUCKWITZ,
Appellant.

(Argued December 9, 1887; decided December 23, 1887.)

William Armstrong for appellant.

William L. Marcy for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

684 MEMORANDA OF CAUSES NOT REPORTED.

ANNA MARIA HOWELL et al., Appellants, v. THE LONG ISLAND
RAILROAD COMPANY, Respondent.

(Argued December 9, 1887; decided December 23, 1887.)

Edward E. Sprague for appellant.

J. R. Burnett for respondents.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. CHARLES N. VILAS, Respondent v.
ABRAHAM R. LAWRENCE, Justice of the Supreme Court.

THIS case presented the same question and was argued and
decided with *People ex rel. Breslin v. Lawrence* (*ante*, p. 607).

JOHN DOW, Respondent, v. THE RECTOR, WARDENS AND
VESTRYMEN OF ST. PHILIP'S CHURCH IN THE CITY OF NEW
YORK, Appellant.

THIS case presented the same questions and was argued and
decided with *Smith v. The Rector, etc.* (*ante*, p. 610).

PROCEEDINGS

IN THE

COURT OF APPEALS

IN REFERENCE TO THE DEATH OF

HON. CHARLES A. RAPALLO,

LATE ASSOCIATE JUDGE OF SAID COURT,

WHO DIED WEDNESDAY, DECEMBER 28TH, 1887.

By order of the court, the bench and the chair of the deceased judge were draped in mourning.

Immediately after the opening of the court his Honor, WILLIAM C. RUGER, Chief Judge, said:

"In accordance with the custom of the court on such occasions as this, no business will be transacted to-day. A memorial of the late Judge RAPALLO has been prepared, and after it has been read the court will be adjourned for the day."

His Honor, CHARLES ANDREWS (who is now the sole survivor of the original seven judges elected to constitute the Court of Appeals in 1870), then read the following:

"The death of Judge RAPALLO leaves a wide gap in the membership of this court. There is more than a vacant chair, for he stood for more than one of seven. It can scarcely be expected that his place will be filled, however wise and fortunate may be the selection of his successor. Judge RAPALLO took his seat on this bench on the organization of the court in July, 1870. He was then a young man in the prime of life, forty-six years of age. His selection was due to the suggestion of one who, himself pre-eminent on the bench and at the bar, had taken a leading part in framing the present judicial system of the state, and who, having been associated with Judge RAPALLO in important litigations, had come to know

and appreciate his great ability. Judge RAPALLO, up to the time of his election to this bench, had no judicial experience. He was not generally known among the profession outside of the city of New York. He came untried into the work of a judge, and year by year during his seventeen and more years of service he grew in the estimation of the bench and bar, and at the time of his death was recognized as one of the ablest judges in the long line of able and eminent men who have adorned the judiciary of the state. His career is an illustration of a fact full of encouragement that there are many men in every community who, though little known, are competent to take up and carry forward the work of the world, as the workers fall out by the way, and to fill with credit to themselves and advantage to the public, places of trust and influence.

“Judge RAPALLO came to the bench well equipped for the high duties of his office. His reading had not been confined to the literature of the law. He was a good classical scholar and was familiar with English authors. His attention at the bar had been chiefly occupied with questions relating to real property and questions of commercial law and the law of corporations, which are the foremost subjects with which a lawyer in a great metropolis has to deal. The first volume of New York Reports, published after his accession to the bench, contains an opinion of Judge RAPALLO in the important case of *Manice v. Manice*, which was argued by eminent counsel and involved perplexing questions relating to the law of uses and trusts, and executory limitations of land. The opinion in this case exhibits a mastery of the subject, a profound knowledge of the intricate branch of the law with which it deals, and the case at once became a leading one in this state, and is constantly referred to in cases involving the construction of limitations in wills and the validity of trusts under the Revised Statutes. Each successive volume of reports contains important opinions by Judge RAPALLO, embracing a wide range of subjects and displaying the resources of a powerful mind informed by reading and reflection, and above all, the absolute sincerity of the author in the search for the true governing principle underlying the discussion.

"This is not the place to enter into an extended notice of Judge RAPALLO's judicial work. He was not a voluminous writer. He was not so much a student of cases as of principles. His opinions are not repertories of authorities, and authorities are but sparingly cited. The philosophy of the law was the matter which attracted and engaged his attention, and his distinction as a judge will rest, I think, upon the largeness and breadth of view which characterize his judicial opinions. He dealt with every subject in its broad aspects. He was not given to over-subtlety and refinement, unless it might be, though rarely then, when the over-mastering equities of a case seemed to compel this treatment. Judge RAPALLO pre-eminently possessed the judicial mind and temper. His intellect was cast in a massive mould. He had great intellectual strength and at the same time great quickness of perception. But this latter quality was so subordinated by his habit of reflection and deliberation that, although he readily appreciated the point of a case and the bearing of arguments, he was slow in reaching his conclusions. When finally reached, he was firm and persistent. But no judge ever came to the consideration of a case with more openness of mind or with greater freedom from prejudice or prepossession. He never rejected an opposing view, not manifestly groundless, without consideration. He frequently surrendered his own impressions and adopted the views of his associates. In consultation he was always helpful and suggestive, and his experience at the bar made his judgment on commercial and other questions of the greatest value.

"Judge RAPALLO possessed great fairness of judgment. He saw the question presented and nothing else. He, however, had a strong sense of equity and sought to reach, if possible, the very justice of the case. But he never permitted his desire to do equity, to subvert the settled law. He recognized the guiding principle of courts, that their province is confined to doing justice within the limitations of the law, and that if courts should exercise the right to bend the law to meet the exigencies of a particular case, the judicial power would become an odious and intolerable tyranny. He was most at home in the higher ranges of juridicial argument, and took

little interest in questions of procedure, or in technicalities, which are often interposed to bar the way to substantial rights. In cases which especially interested him his examinations were exhaustive and he did not stop until he had explored, not so much the decided cases, as the foundation principles upon which the right depended. His opinions, in my judgment, are models of judicial style. His style is simple, perspicuous, dignified; there is no amplification which obscures the sense; nothing which does not contribute directly to bring out and illustrate the point decided.

"In the combination of qualities which fit a man to be a judge, Judge RAPALLO had few, if any, superiors. He possessed intellectual gifts of a high order, absolute integrity of purpose, a calm and dispassionate temper, great good sense, a solid judgment, and these, united with adequate learning and a power of philosophical analysis, constituted him, as I think, one of the first judges of our time. His death touches the members of this court, his associates, for many years, more closely almost than any not connected with his immediate family. Sincere, courteous, manly, they have learned to love him as a brother. They will sadly miss him from the bench and in the intercourse of social life. His death comes to some of us at least with a peculiar significance. It seems to make us feel more sensibly than ever the drawing of the current which is carrying us all to the inevitable end."

The court then adjourned.

On the 20th day of January, 1888, after the opening of the court, Hon. AMASA J. PARKER arose and said:

"May it please the Court:

"I am requested to present the resolutions adopted at a meeting of the members of the bar, held at Albany, in memory of Judge RAPALLO, and to ask that they be entered on the minutes of this court, where he served so long and with so much distinction. The resolutions are as follows:

The bar of Albany learns with sincere regret of the death of Judge RAPALLO. From the time of the organization of the Court of Appeals in 1870 to the present year, the judicial duties of Judge RAPALLO have made him, for a great por-

tion of each year, a resident of this city. In common with the bar of the entire state we have learned to admire and respect him for his great ability and uprightness as a judge, and have had, from the circumstances above alluded to, peculiar opportunities to know him as a neighbor and a man, and to appreciate the kindness of his heart, and the other qualities which won for him the affection and regard of all who knew him. It has been with deepest sorrow and with a sense of personal loss that we have learned of his decease. It is, therefore,

'Resolved, first. That in the death of Judge RAPALLO the high court of which he was a member has lost the services of an upright and learned judge, who, by his industry, his sound sense, his deep discernment, his impartiality and conservatism, has done much to promote and secure the stability and certainty of the law, and to place it upon the firm foundation of justice and equity.

'Second. That this city, and especially the members of the legal profession therein, mourn his loss as a friend and neighbor.

'Third. That a committee of five, of whom the chairman be one, be appointed to attend the funeral as representatives of the bar of Albany.

'Fourth. That a copy of these resolutions be presented to the Circuit Court, to be held in this city January ninth; also to the Court of Appeals at the next session, and that a copy thereof be sent to the family of the deceased.

'ALBERT HESSBERG,

Secretary.

"H. E. SICKELS,

Chairman.'

"I feel that, personally, I owe this duty to my deceased friend. I had learned of his great ability as a lawyer long before this court was organized, in a legal controversy in New York, involving large interests, in which he was the counsel opposed to me. And knowing his ability, I urged him to accept a nomination for a seat in this court in 1870, which he hesitated, at first, to accept; and I have watched with much interest, as have those I represent, the great and just reputation he has established and maintained, as a judge of this high tribunal of last resort. The thoroughness with which he examined a

question, not overlooking the principle involved while he paid due respect to precedent, and the clearness with which he stated a legal proposition, and his entire independence of thought and action, have been with him distinguished and marked characteristics. The opinions he has left in our reports during the last seventeen years, will remain for all time as the monument of his distinguished judicial career. I am sure the members of this court, as well as of the bar which I represent, will class Judge RAPALLO among the ablest judges this country has produced.

"By such labors as his, the whole world is benefited. Wherever the English language is spoken, his opinions will be cited and read, and their application will aid in administering justice. To the high reputation this court has attained as one of the ablest judicial tribunals of the country, he has contributed his full share — a reputation that fully vindicates the wisdom of our system by which the highest court is chosen by the suffrages of the people.

"I ask the order of the court that these resolutions be entered on the minutes."

The order was granted.

William B. Davenport, Esq., on behalf of the Kings County Bar, presented the following:

"At a meeting of the Bar of Kings County, held in the Circuit Court room, January 4, 1888, presided over by Hon. George G. Reynolds, the Hon. Benjamin D. Silliman stated that the committee of arrangements had caused to be prepared the following minute and resolutions:

"The members of the bar of Kings county have assembled to express, with unanimity and sorrow, their sense of the great loss which not our state alone, but the whole country, has sustained in the death of Judge RAPALLO. Though the high court of which he was a member is limited in its immediate jurisdiction to this state, yet its decisions are "leading cases," and the law which these decisions establish is mainly accepted in other states and becomes their rule of action as well as our own. Judge RAPALLO's fame as a jurist rests on the firm foundation of his learning, his just, discriminating and powerful mind, and the entire purity of his character.

"Jurisprudence grows by the establishment of one principle after another, as a grand cathedral rises slowly upward by the placing in position of single stones. The workmen upon the stately pile die and are forgotten, and their places are taken by others equally obscure, and as soon lost sight of during the centuries of construction. Not so with those whose strong minds, clear conception and sound judgment mould and form our common law. The opinions of the judge live after him, for he builds himself into the solid edifice of jurisprudence. He devotes what is best of himself, and with this he does his work upon the structure. As long as it will last so long will his memory endure, for he is part of it.

"Of few of the great judges whom this state has produced is this more true than of CHARLES A. RAPALLO. For nearly eighteen years he has been a justice of our highest appellate tribunal. Ascending the bench at the age of forty-seven, he gave to the public service the best years of his life, when his matured judgment, ripe experience and physical vigor were all at their best. He was born on the 15th of September, 1823, in the city of New York, whither his father, a native of Italy, came in early life. His mother, born in New England, was of English descent; and in his mental and physical traits are found the best qualities of both the races from which he sprang. The elder Rapallo was a man of refined and upright character, of cultivated mind and an accomplished linguist. He personally superintended the education of his son, and instructed him in several modern languages as well as in the classics. He was also a member of the bar, and for many years occupied offices with the celebrated John Anthon, who, about fifty years ago, was reputed to have the largest common law practice in the city. At the age of fourteen the younger RAPALLO entered the office of his father. His first association elsewhere was with Jonathan Miller, an excellent gentleman and lawyer at that time, prominent as a conveyancer and counselor of persons having the management of large estates. Mr. CHARLES A. RAPALLO was his managing clerk for several years. At the age of twenty-one Mr. RAPALLO was admitted to practice, and in 1845 he formed a partnership with Joseph

Blunt. The firm of Blunt & Rapallo numbered among their clients many important corporations and prominent men of the day. They were the attorneys of the Mutual Life Insurance Company, which still holds mortgages secured on real estate, the title to which was examined by its junior attorney forty years ago. In 1848 the principal professional association of his life was formed with Horace F. Clark. The new firm at once took a leading position at the New York bar. In 1852 the Court of Appeals listened for the first time to its future judge against Nicholas Hill, then in the full tide of his extraordinary professional career. Mr. RAPALLO argued the case of *Donnelly v. Corbett* (reported in 7 N. Y., 500). From that time to his elevation to the bench, in 1870, few volumes of the reports of the court fail to record his labors at the bar. He soon had large professional responsibilities in advising not only Mr. Clark (who had become largely engaged in railroad management), but Mr. Vanderbilt also, whose personal counsel he was for many years before he became a judge. In 1847 Mr. RAPALLO formed a partnership with James C. Spencer, afterward a judge of the Superior Court of the city of New York. The firm of Rapallo & Spencer was soon plunged into the great Erie litigation. Suit followed suit, injunction succeeded injunction with startling rapidity, until the contest finally assumed the form of a war between contending courts. Throughout this storm of legal artillery Mr. RAPALLO, as the counsel charged with the principal responsibility of directing the attacks, displayed the quick resource, the cool judgment, the steady courage, the ample learning, the untiring industry that subsequently stamped him in another sphere as one of the great judges of our commonwealth.

“In 1870, the first election took place of judges of the Court of Appeals, under the constitutional amendments providing for the present organization of the court. Seven judges were chosen to hold office for fourteen years from January 1, 1871, and SANFORD E. CHURCH, as Chief Judge, WILLIAM F. ALLEN, MARTIN GROVER, CHARLES A. RAPALLO, RUFUS W. PECKHAM, CHARLES J. FOLGER and CHARLES ANDREWS, as

associate judges, were elected. Of these seven judges, CHARLES ANDREWS, the youngest, alone survives.

"In 1884, Judges RAPALLO and ANDREWS, though of opposite political parties, were re-elected for the term of fourteen years by the substantially unanimous vote of both parties, a striking tribute to their excellence and a striking proof of the wisdom of the people in holding the ermine aloof from party contests.

"Judge RAPALLO was not a politician or a partisan. He held no public office prior to his ascending the bench, nor did he either before or after that event take active part in the councils or the plans of the party to which he was attached. His heart was in his profession. As a lawyer he gave his time, his thoughts, his energies to his clients. As a judge his devotion to the public interest took the place of his former care for his clients' weal. The claim of CHARLES A. RAPALLO to a permanent and honored place in the history of the state rests upon his labors as a judge. The successful practitioner at the bar, while he assists in making law for the time and the nation, still primarily serves his clients, not the public. At the time Judge RAPALLO went upon the bench he was in the full tide of professional success, with a clientage numbering very many persons foremost in business and corporate circles, and was in receipt of professional emoluments far beyond the salary of the judgeship he accepted. He neither sought nor desired the office to which the people called him, but he felt himself bound to obey the summons. A strong sense of duty and of the absolute necessity of performance of every obligation assumed was one of his leading characteristics. This led him to the execution of his judicial tasks with scrupulous fidelity. In the regular routine and quiet surroundings of the Court of Appeals he found the necessary occupation for his powerful intellect, in the discussion and solution of great legal problems. He had clear and strong perceptions, a firm and tenacious hold upon the principles of the law, a strong memory for the facts of each particular case under consideration and a singularly lucid method of stating his reasons and conclusions. His mind was contemplative and reflecting. In his opinions he does not appear hastily to run to his result, but it almost

seems as if his conclusions advanced to meet him half way, so naturally, and apparently without effort, were they attained. His logically balanced mind was happily joined to an even temperament, a genial disposition and a kind heart. Deliberation and patience were among his prominent characteristics, and, with his large abilities made the rare combination of qualities that stamped him as a great jurist. The bar of this state has fully appreciated his powers and his usefulness. For years no opinions in the Court of Appeals have been received with greater satisfaction and commanded higher respect than his. His eminent associates on the bench have been long accustomed to give him full credit for the strength he imparted to the court, and the relations between him and them were those of cordial friendship. Now, therefore, be it

“Resolved, That in the death of CHARLES A. RAPALLO an irreparable loss has been sustained; to the bar, of a considerate professional brother; to the Court of Appeals, of an industrious and learned associate; to the state, of a faithful and upright judge; that the high standard of ability, integrity and industry that he ever maintained was worthy of the august tribunal in which he sat and of the best traditions of the profession he adorned; that the fearless impartiality of his judgment, the simple manliness of his character, and the genial traits of his disposition, justly command respect, admiration and affectionate regard; that his contributions to the jurisprudence of the state of New York will best preserve his fame, and testify to other times and nations, the just and high appreciation in which he was held by his own generation.

“Resolved, That copies of the foregoing minute and of this resolution be sent to the judges of the Court of Appeals and to the family of the deceased.

“The resolutions were seconded by Hon. B. F. Tracy, Josiah T. Marean and William C. Dewitt, and unanimously adopted.

“GEO. G. REYNOLDS,

“President.

[Attest.]

“CHAS. J. PATTERSON,

“Secretary.”

The resolutions were received and ordered entered on the minutes of the court.

On the 28th day of February, 1888, Hon. WILLIAM ALLEN BUTLER, on behalf of the New York State Bar Association, presented the following:

TRIBUTE TO THE MEMORY OF THE LATE JUDGE CHARLES A.
RAPALLO.

"Since our last annual meeting, and within a few weeks, one of the most eminent of American jurists, the Hon. CHARLES A. RAPALLO, a judge of the Court of Appeals of this state, and an honorary member of this Association, has been removed by death from among us. He had occupied a seat upon the bench of our highest court for over seventeen years. After the expiration of his first term of fourteen years, he was unanimously re-elected for another term. Before his elevation to this exalted judicial position, he held a high and honorable position at the bar. The death of such a man is a great loss, not only to the court of which he was so distinguished an ornament, but to the bar of the state. It is, therefore, fitting and proper that a tribute to his memory should be adopted by this association, and entered upon its permanent records; it is, therefore,

"Resolved, first. That the members of the Association of the Bar of the State of New York will ever cherish the memory of CHARLES A. RAPALLO as an able, learned and thorough lawyer; an upright, sagacious and independent judge, of clear and vigorous intellect, singularly quick and accurate in his apprehension of the questions involved in cases presented, grasping the decisive points almost by intuition, and deciding them in accordance with his own deliberate and unbiassed judgment, utterly regardless of popular clamor or possible consequences to himself.

"Second. That it will be fortunate for the State if the industry, wisdom, independence and firmness in adhering to and enforcing settled principles of law, which have characterized Judge RAPALLO's judicial career, shall be successfully emulated by those who come after him; and that so long as these

qualities which he possessed in so eminent a degree, shall continue to characterize the judges of our highest court, it will, in the future as it has in the past, command the confidence and respect of all intelligent and reflecting men.

"*Third.* That a copy of the foregoing memorial and resolutions be presented to the Court of Appeals by a committee to be named by the president, of which he shall be chairman; and that another copy be forwarded by the secretary to the family of the late lamented judge."

The resolutions were received and ordered entered on the minutes of the court.

Mr. Stephen Nash, presented the following on behalf of the Association of the Bar of the city of New York:

At a stated meeting of the Association of the Bar of the city of New York, held at the house of the Association in the city of New York on the 13th day of March, 1888, Mr. Payson Merrill presented the following resolution:

Resolved, That the memorial of Hon. CHAS. A. RAPALLO, late Judge of the Court of Appeals, prepared on behalf of the executive committee by Mr. Stephen P. Nash, former president of this association, be adopted, and that Mr. Nash be requested to present a certified copy thereof to the Court of Appeals on behalf of the Association.

JOSEPH H. CHOATE,

S. B. BROWNELL,
Secretary.

President.

[Attest.]

Extract from the minutes.

MEMORIAL.

In the death of Judge RAPALLO, the Association of the Bar of New York loses one of its most eminent members. He was among those whose solicitude for the honor of our profession led to the formation of the Association, and although his elevation to the bench soon after our organization precluded him from taking an active part in any but its earlier proceed-

ings, his wisdom, earnestness and sound judgment were of great value in those beginnings of the enterprise to which its subsequent success is due. He was a member of the first executive committee, of which there are now few survivors.

In preparing a memorial of any of these founders, the fact comes sadly home to those upon whom the duty falls, that the youthful companions of the departed friend are beyond the call for personal reminiscence, and that meagre second-hand information is all that can be gleaned for material.

CHARLES ANTONIO RAPALLO was the son of Antonio Rapallo and Elizabeth Gould, and was born in the city of New York on the 15th day of September, 1823. His father, Antonio Rapallo, was an Italian, whose family lived near Genoa, and who came to this country in early life and settled in New York, where he was admitted to the bar and subsequently practiced his profession. He married Miss Gould in 1819. Her father was engaged in the battle of Lexington, served as an officer in the Continental army during the Revolution and was elected to the first congress. Her sister was Hannah Flagg Gould, whose patriotic lyrics and poems of domestic life gained for her in the early part of the century a widely extended audience.

Antonio Rapallo was a gentleman of many acquirements. He personally superintended the education of his son Charles, who became an accomplished scholar, not only in English, but also in the Italian, French and Spanish languages, each of which he spoke with ease and fluency. At an early age he began his legal studies, also under the supervision of his father, who had offices in connection with John Anthon. Mr. Anthon is said to have had at that period the largest general practice of any lawyer in the city. Mr. Antonio Rapallo for a time acted as counsel for some of the Italian principalities, and in this relation the young law student met many an Italian exile, sympathizers with Garibaldi and others, whose names have since become connected with the struggles which ultimately led to a united Italy.

Charles was admitted to the bar at the age of twenty-one, without having been either at school or college. It may be

surmised that a certain taciturnity and reserve which characterized him may have been due to his not having been thrown more with school companions. But he never betrayed in the literary work of his profession any lack of scholastic training or acquirement, nor on the other hand was there in his style any display of that familiarity with foreign tongues which often tempts its possessor to some parade of it. Shortly after his admission to the bar, he entered the office of Jonathan Miller, then counsel of the Astor estate, with whom he remained until he formed a partnership with Joseph Blunt. His next professional connection was with Horace F. Clark and then with James C. Spencer. In 1852 he married Helen Sumner, a daughter of Bradford Sumner, a prominent lawyer in Boston, Massachusetts.

It is said of him that in his early professional life he was often called upon to defend Italians in the criminal courts, charged with stabbing, but that, finally, owing to the frequency of the cases, he announced that he would defend no one who used a knife, and that this resolution led to a marked diminution in the number of offenses of this character.

But Mr. RAPALLO's professional life was occupied almost exclusively with business in the civil courts, and though his practice was a varied one, he was employed mainly in matters relating to estates, trusts, corporations, testamentary and commercial law, in all which he gained an experience that fitted him for the position that he was soon called upon to fill.

The Court of Appeals, established by the Constitution of 1846, consisted, as will be remembered, of four permanent judges and four who came up annually from the Supreme Court. This arrangement, though theoretically attractive, was found not to work satisfactorily, and in November, 1869, an amendment to the Constitution provided for a court of seven prominent judges. The first election for the new court was a special one held in May, 1870, and Judge RAPALLO was then elected with CHURCH, Chief Judge, ALLEN, PECKHAM, GROVER, FOLGER and ANDREWS as associates. The last-named is now the only survivor of this first court, and his graceful and discriminating tribute to the memory of his associate, read at the

opening of the January term of the court, leaves nothing to be added in reference to Judge RAPALLO's judicial characteristics.

Mr. RAPALLO, as has been stated, was a member of the first executive committee of this Association, elected at its meeting of February 15, 1870, and charged at the same meeting with the duty of preparing "a suitable address to the members of the bar of the city and state of New York, stating the formation and objects of the Association and requesting their co-operation." It may well be imagined that the abuses which had led to the formation of the Association had somewhat excited its promoters, and that this excitement had ~~found~~, perhaps, too distinct an expression in some passages of the address as submitted to the committee, and it is understood that as RAPALLO's simplicity of character recoiled from anything which might appear like exaggeration, his wise counsels, while not offered to weaken any of the positions of the paper, were of service in giving a tone of dignity to what might otherwise have been thought intemperate in statement, or too vaunting in announcement of hoped-for reformatations.

From the time he took his seat in the Court of Appeals, in July, 1870, till his last illness, some seventeen years, his life was one of continuous and faithful devotion to the duties of his office. Elevated to a seat in the highest court of the state, and this an appellate court, sitting only in review of the decisions of subordinate tribunals, without having had any previous judicial experience, his immediate success in disarming criticism and in winning general confidence is proof that he had the mental endowments, the sound learning and the integrity of character essential to the making of a great judge. His first term expired in 1884, and he was re-elected without opposition. His written opinions are contained in some fifty-seven volumes of reports. They deal with all the subjects of litigation over which any court of the state has jurisdiction, criminal and civil, legal, equitable, testamentary or constitutional. They show great facility in the orderly arrangement of complicated details, and in the statement of legal principles applicable to them, indicating a superior intellectual faculty,

700 DEATH OF HON. CHARLES A. RAPALLO.

thoroughly trained, supplied with adequate learning and working with ease and precision.

Among the important traits of CHARLES RAPALLO's character was his absolute truthfulness. No recollection of him survives that imputes to him, during his most animated contests in professional life, anything like deception. He was courageous also in the performance of his duty, and, as judge, administered his office without respect of persons, finding the law in its authoritative sources, not in the clamor of self-constituted oracles. But feeling that the law sometimes worked harshly, he never forgot to be humane, nor was disposed to shut the doors upon any right to have the proceedings of any lower court examined, believing, as he has been heard to say, in giving every poor wretch a chance before final sentence in every stage of a case where the law provided a review. But when that review came, it was the law of the case as he understood it, not extraneous influences of sympathy or aversion, that ruled his action.

The life of a lawyer is generally an uneventful one; that of a judge at the present day, one of unvaried toil. The ordinary performance of his duty excites little notice; none hardly, except from the criticisms of the disappointed. But when the account is closed and the career reviewed, none can be found in civil affairs worthy of higher praise than that of the upright judge, who, through good report and evil report, has faithfully fulfilled the duties of his high office. This is the tribute which this Association feels to be due to our lamented associate.

INDEX.

ABATEMENT AND REVIVAL.

Where one who ought to have been, but was not, joined as a party plaintiff in an action dies before the trial, and the plaintiffs named fully own and represent the cause of action, the fact of such death may be proved in reply to a plea in abatement, setting up the non-joinder. *Groot v. Agens.* 638

ACCUMULATION

1. The will of L. gave a life estate in two-twentieths of his property to his widow, the remainder over to his infant daughter M., in case she survived her mother; if not, then to certain other beneficiaries in the order named. In an action for partition of certain real estate of which said testator died seized, commenced during the minority of A., and wherein she was made a party defendant, the judgment directed a sale of the premises. The testator's widow was given the liberty to accept, and did accept, out of the proceeds of sale, a gross sum in lieu of her interest as tenant for life, and the balance of the purchase-money of the two-twentieths was directed to be paid into court, to be invested by the chamberlain of the city of New York, and, upon the death of the life tenant, the fund, "with all accumulations of interest, dividends or income," to be paid to M., if then living; if not, then to the beneficiaries entitled under the will to take. Upon coming of age M. petitioned that the accumulation be paid over to her on the ground that such accumulation was prohibited by statute (1 R. S. 726, §§ 87, 88), and that she was entitled thereto "as presumptive owner of the next eventual

estate." *Held*, that the matter of the disposition of the fund was directly involved in the action and was *res adjudicata*; and, therefore, that the petition was properly denied. *Livingston v. Tucker.* 549

2. *It seems* that the directions for accumulation were proper, as the will did not contemplate any directions authorizing it, and as the income was paid off in advance out of the principal, when subsequently received, it was properly devoted to restoring said principal to the condition it would have been if it had not been thus depleted. *Id.*

ADVERSE POSSESSION.

In an action of trespass to recover damages for the erection of a wharf and bridge over the waters of Setauket bay, plaintiffs claimed under an unrecorded deed executed by S. in 1768, which purported to convey "a certain piece of salt thatch" by lines which included the *locus in quo*. Plaintiffs proved that from time to time the grantees under the deed cut the salt thatch growing on the premises, and that one of them leased to another the right to cut thatch; there was no evidence that the town in any way ever recognized any title under the deed or that it had any notice of it. The premises were never enclosed, but remained open, subject, without obstruction, to the ebb and flow of the tide and to the uses of a public landing place. It also appeared that the trustees of the town exercised jurisdiction over the part of the shore in question and inconsistent with the claim of title made by plaintiffs. *Held*, the evidence failed to show any title by adverse posses-

sion; that assuming the town was cognizant of the acts of S. and his grantees in cutting the thatch, that they claimed an exclusive right and that it acquiesced therein, this, at most, gave plaintiffs simply a prescriptive right as against the town to take the thatch; it did not confer a title to the soil. *Roe v. Strong*. 850

AGREEMENT.

See CONTRACTS.

ANTE-NUPTIAL AGREEMENT.

1. Ante-nuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts and will be enforced in equity according to the intention of the parties. *Johnston v. Spicer*. 185
2. In order to effectuate such intention courts of equity will impose a trust upon the property agreed to be conveyed, commensurate with the obligations of the contract. *Id*.
3. It is immaterial whether a trustee is appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired. *Id*.
4. The contract also will be enforced in equity to accomplish the object the parties had in view, without reference to the validity of the agreement at law. *Id*.
5. By an ante-nuptial agreement between G. (the man) and E. (the woman), G. covenanted and agreed that, in case of his death, without leaving lawful issue by the contemplated marriage, previous to the death of E., all of the real and personal property, of which he should die possessed, should belong to her. The parties intermarried, but had no children, and G. died intestate seized of certain real estate, upon which was a mortgage. E. died thereafter intestate, leaving no lawful heir. In a controversy as to the right to the surplus money arising on foreclosure sale *held*, that upon the death of G. the legal title to the real estate went to his heirs; but that by force of the marriage settlement, E. became the equitable owner, and a trust by implication arose in her favor; the heirs holding the title as a naked trust for her and subject to her right to be vested with it on demand; and that upon her death without heirs her interest and rights reverted to the State, and it was equitably entitled to the surplus. *Id*.
6. Certain of the heirs of G. procured the passage of an act (Chap. 377, Laws of 1885), entitled "An act to release the interest of the People of the State of New York in certain real estate to * * * (said heirs), and for other purposes." Its first section purports to release to the persons named in the title the interest which the State acquired by escheat in certain real estate described. The second section assumes to release to said persons all the interest which the State has in the personal property, of which E. died possessed of, or was entitled to. *Held*, that the act was violative of the provision of the State Constitution (art. 3, § 16), which declares "that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." *Id*.
7. Also, *held*, that the heirs of G. having the legal title to the property, and so presumably being in possession thereof at the time of the passage of the act, had the right to maintain their title and possession against all except E., or those who had lawfully succeeded to her rights; and so, those not named in the act were entitled to raise the objection that it did not vest those rights in the grantees from the State. *Id*.

APPEAL.

1. *It seems* that where the record on appeal in a criminal action from a

- judgment of a court of general jurisdiction discloses upon its face that the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded, or that there was some other fundamental defect in the proceeding which could not be waived or cured, it is the duty of the appellate tribunal to reverse, although the question was not formally raised in the court below and is not presented by any ruling or exception on the trial. *People v. Bradner*. 1
2. The omission of the clerk in his entry of judgment in a criminal action to state the offense for which the conviction was had, as required by the Code of Criminal Procedure (§ 485), does not render the sentence void. The defect is amendable; and, upon appeal to this court, other parts of the record may be referred to, and if they furnish evidence of the fact so omitted in the entry, the court may conform the entry to the fact. (§ 548.) *Id.*
3. Even if a single phrase of the charge of a court in a criminal action, isolated from the rest of the charge, is found to be erroneous, the judgment should not, on that account, be reversed, if the whole charge properly instructed the jury, and it can be seen, with reasonable certainty, that the erroneous portion did not mislead the jury or influence the verdict. *People v. Dimick*. 18
4. On appeal from an order of reversal in a criminal action, the defendant, for the purpose of sustaining the reversal, has the right to rely not only upon the grounds on which the reversal was based in the court below, but upon any error to be found in the record. *Id.*
5. It is the duty of an appellate court to give, in a criminal action, with reason and discretion, full force and effect to the provision of the said Code (§ 542), declaring that "after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties," and the one which provides (§ 684) that "neither a departure from the form or mode prescribed by this Code in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid unless it has actually prejudiced the defendant." *Id.*
6. It is error for the General Term of the Supreme Court to base a reversal of a judgment rendered by a trial court upon facts not proved before or found by it. *Day v. Town of New Lots*. 148
7. While an appellate court under certain circumstances may permit a record not given in evidence below to be produced upon the argument, it is allowable only for the purpose of sustaining the judgment, never for the purpose of reversing it. *Id.*
8. In reviewing judgments rendered upon trial before a court or a referee, it is the duty of the appellate court to indulge all reasonable presumptions in support of the judgment and to assume when necessary, that all the evidence in the case was considered, and a conclusion thereon, adverse to the appealing party, reached. *Id.*
9. To give this court jurisdiction to review a decision of the General Term, reversing a judgment and granting a new trial in an action tried by a jury, the General Term order must show the facts conferring the jurisdiction. It is sufficient to render a consideration of the appeal impossible that the General Term may have reversed upon a question of fact. *Pharis v. Gere*. 231
10. The record on appeal from such an order contained a recital, immediately following the statement of rendition of the verdict, that "the court thereupon denied the motion of the defendant for a new trial upon the minutes." Following this was a formal order stating the making of a motion for a new trial on the minutes, and that "said motion be and the same is hereby denied." Then followed an order

of the General Term, which recited an appeal from the order denying the motion for a new trial, and from judgment, and reversed both the order and the judgment and granted a new trial. The case also disclosed that there were disputed questions of fact. On appeal from the General Term order, *held*, that said court had jurisdiction of the questions of fact, and it was to be assumed that its order was based upon some one of the grounds mentioned in the provision of the Code of Civil Procedure (§ 990), in reference to motions for new trial on the minutes, and as it could not be said that the reversal was not upon a question of fact the order was not reviewable here. *Id.*

11. *It seems*, an order denying a motion for a new trial made on the minutes should state the grounds on which the motion was made. If it does not the General Term may affirm or refuse to hear an appeal therefrom until the order is corrected by stating the question passed upon by the trial court. *Id.*

12. The General Term, however, may entertain such an appeal; and where it does, and the questions are argued and submitted to it, and it reverses the order and grants a new trial, it must be assumed its decision was based on some one of the grounds embraced in said provision; and where the case presents disputed questions of fact, it may not be said that the reversal was not on such a question. *Id.*

13. As to whether an appeal lies to the Supreme Court from an order made by a County Court in an action in which a transcript was filed from Justice's Court, *quære. Ithaca Ag. Wks. v. Eggleston. 272*

14. A transcript of a Justice's Court judgment for \$310.69 was filed in the county clerk's office. After the expiration of five years a motion was made by plaintiff in the County Court for leave to issue execution. On the hearing of the motion defendant did not appear, but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment,

under and by virtue of an assignment executed by plaintiff's general agent. The matter was referred to a referee, who reported that plaintiff made an agreement in writing to sell the judgment, and that there was no fraud inducing it. The court, on hearing counsel for plaintiff and the contestant, the defendant not appearing, confirmed the report, denied plaintiff's motion, with costs to the contestant. *Held*, that it was a special proceeding within the meaning of the Code of Civil Procedure (§ 1357), and that the order was appealable to the Supreme Court. *Id.*

15. The refusal of a trial judge to find on questions of fact is not fatal to his judgment where the findings asked were not material to the decision of the case, or would not be beneficial to the party asking them. *Callanan v. Gilman. 390*

16. Under the provision of the Code of Criminal Procedure (§ 528, as amended by Chap. 498, Laws of 1887), vesting in the Court of Appeals jurisdiction to examine the record on appeal in a criminal action "where the judgment is of death," and to determine upon the whole case whether "the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," the defendant is not given and may not claim, as matter of right in this court, the benefit of errors occurring on the trial; the failure to make proper objections and take exceptions deprives him of that right; the court is simply vested with a power in its discretion to disregard the neglect and without regard to exceptions to review the case upon the merits. *People v. Driscoll. 414*

17. Where, therefore, evidence was received or rejected without objection, on the trial in such an action, which if proper objections and exceptions had been taken, would have required a reversal, the court is not bound to reverse, and is

- only authorized to do so, in its discretion, where it appears affirmatively from the whole case, that injustice has been done to the accused in the result arrived at by the trial court. *Id.*
18. Under the new practice introduced by the provision of the Code of Civil Procedure (§ 992), forbidding exceptions to findings of fact in actions tried by the court or a referee, and permitting questions of fact to be reviewed by the General Term without exceptions, it is the duty of an appellant desiring a review of questions of fact to see that the case contains a certificate that all the evidence has been included, or all bearing on the questions so sought to be reviewed; in the absence of the certificate the General Term has a right to refuse to review such questions. *Porter v. Smith.* 581
19. A party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal. *Hayes v. Nourse.* 577
20. Where, upon hearing on *habeas corpus* before a justice of the Supreme Court, the relator was remanded to custody, and the General Term, on *certiorari*, directed to said justice as such, reversed the order and directed the discharge of the prisoner. *Held*, that said justice was not the proper person to take an appeal to this court; that the decision affected no substantial right of his within the meaning of the Code of Criminal Procedure (§ 519), or of any person of whom he was the legal representative or agent. *People ex rel. v. Lawrence* 607
21. *It seems* the appeal in such case should be taken "in the name of the People" by the attorney general or the district attorney. (Code of Civ. Pro., § 2059.) *Id.*
22. An *ex parte* order was made by a justice of the Supreme Court for the examination of one of defendant's officers before trial. Upon motion made before another justice on the papers on which the order was granted, and other affidavits and papers, the order was vacated. The justice who granted the first order was a member of the General Term which heard an appeal from the second order. *Held*, that as the first order was not under review by the General Term, the objection that the court, as constituted, was violative of the constitutional prohibition against a judge or justice sitting in General Term in review of a decision made by him was not tenable. (State Const., § 8, art. 6.) *Philips v. Germania Bk.* 680
23. An appeal may not be taken to this court from an interlocutory judgment. (Code of Civil Pro., §§ 190, 191.) *King v. Barnes.* 645
24. An order of General Term reversing an order made on trial which denied a motion to amend the complaint, and granting the amendment, when the amendment does not virtually change the plaintiff's claim, is in the discretion of the court and is not reviewable here. (Code § 723.) *Id.*
25. The judgment of the General Term herein ordered that certain shares of stock should be delivered by one of defendants, who held them as depository or custodian, to a referee appointed by the judgment. On appeal by defendants to this court they gave the security required to perfect the appeal. (Code, § 1826.) They then moved that the custodian be required to deliver the stock to the referee, which was granted, and the stock was so delivered. On motion of certain of the defendants, plaintiffs' proceedings on the judgment were stayed until the hearing and decision of said appeal; that order was reversed by the General Term. *Held*, that the General Term order was not reviewable here; that if the proceedings were in fact stayed by the Code (§ 1828), the appellants were not entitled as a matter of right to an order, but it was in the discretion of the court, and its

determination was not reviewable here. *Id.*

—When question not raised on trial may not be raised on appeal.

See Serviss v. McDonnell. 260

See Smith v. Rector, etc. 610

—Where notice of appeal did not show by indorsement or otherwise office address or place of business of the attorney, it is ineffectual to limit time of appeal.

See Fortmann v. Shulting. (Mem.)

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APPURTENANCES.

1. By the word "appurtenance" nothing passes except such incorporeal easements, rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted; a mere convenience is not sufficient to create such a right or easement. *Root v. Wadhams* 384

ASSESSMENT AND TAXATION.

1. The complaint herein alleged, in substance, that plaintiff purchased certain premises on a mortgage foreclosure sale, and paid the sum bid to the referee making the sale, who made the payments directed by the decree and by order of the court deposited the surplus with the county clerk; that on or about February, 1874, defendant's collector received \$2,197.82 of such surplus from said clerk, and applied it upon a warrant held by him for the collection of an assessment on the premises for a local improvement, which assessment was subsequently adjudged to be illegal and void, and that \$1,499.98 of said sum so received "belonged to and was and still is the property of plaintiff," and was so taken and received without his knowledge or consent. The only question of fact litigated upon the trial was as to the ownership of the surplus, and the only testimony given by plaintiff on this subject was that he paid a subsequent valid assessment for the same improvement. No offer

was made by plaintiff to amend his complaint or to conform the pleadings to the proof. *Held*, that judgment was properly rendered dismissing the complaint, as the proof failed to show that plaintiff had any title to the surplus, which belonged to the mortgagor or the owner of the equity of redemption; that any equitable right plaintiff may have had to require the payment of the valid assessment out of the surplus could not be determined, as it was not presented by the pleadings and the real party in interest was not represented in the litigation; that the provisions of the Code of Civil Procedure requiring objections as to defect of parties to be raised by answer or demurrer did not apply, as defendant was only required to plead to the cause of action stated in the complaint. *Day v. Town of New Lots.* 143

2. *It seems* it is competent for the court in the judgment in a foreclosure action to direct the land to be sold free of all liens, taxes and assessments or subject thereto, or it may require them to be paid out of the proceeds of sale under such terms and conditions as it shall prescribe. *Id.*
3. The act of 1882 entitled "an act to amend chapter 229 of the Laws of 1879, entitled 'an act in reference to the collection of taxes in the counties of Chautauqua and Cattaraugus,' and the act amendatory thereof and supplemental thereto" (Chap. 287, Laws of 1882) is not violative of the provision of the state Constitution (art. 8, § 16), which declares no private or local act shall embrace more than one subject and that shall be stated in the title; the subject stated embraces the entire system of collection, including the sale of lands to enforce collection, the conveyances and their force as evidence and muniments of title. *Ensign v. Barre.* 329
4. Said act of 1882 is not repugnant to the provision of said constitution (art. 1, § 6), or of the federal Constitution declaring that no person shall be deprived of life, liberty

- or property without due process of law. *Id.*
5. The provision of said act (§ 2), declaring that whenever a period of fifteen years shall have elapsed after a conveyance, on a tax sale, of the lands of a non-resident lying in said counties, and the former owner or claimant shall not have entered into possession within that period, the conveyance shall be conclusive evidence that the sale and the proceedings prior thereto were regular, etc., was not intended to and does not cure jurisdictional defects of such a nature as that the legislature could not have dispensed with the statutory requirement, a failure to comply with which constitutes the defects. *Id.*
6. The act only raises a conclusive presumption of regularity, leaving the questions of the assessors' jurisdiction and authority unaffected, in points which may not be dispensed with by legislative action. *Id.*
7. A defect may be in one sense jurisdictional, as regards the authority of assessors acting under an existing law, and yet not so as it respects the power of the legislature to pass a statute curing the defect. *Id.*
8. An omission of the dollar mark in the statement in a tax roll and warrant of the amount of a tax is not a jurisdictional defect. *Id.*
9. Where an assessment-roll, made out in 1849, was not signed by the assessors as required by the provisions of the statute then in force (1 R. S., 393, § 26), but the certificate, which was written upon the roll itself and which referred to it as the "above assessment-roll" and as having been the work of the assessors, was signed. *Held*, that the defect was not jurisdictional, and so, not beyond the reach of the act of 1882. *Id.*
10. *It seems* that if the certificate had been written on a separate piece of paper and attached to the roll, the conclusion would have been the same. *Id.*
11. In that part of the certificate which related to the mode of valuation the words "solvent creditor" were written instead of "solvent debtor." *Held*, that this was not a jurisdictional defect. *Id.*
12. The assessment was for a county and highway tax, no number of the road district or date of the commissioners' warrant was given. *Held*, it was not requisite that these details should appear on the assessment-roll. *Id.*
13. The sale was in 1852. The county treasurer's notice of sale was not delivered to the printers for publication on or before the first day of September as required by the act of 1850 (Chap. 298, Laws of 1850). The day of sale was the first Tuesday in December; the notice was dated September fifteenth; it was published once in each week for the prescribed ten weeks. *Held*, that the defect was not jurisdictional. *Id.*
14. The provision of the act of 1835 (§ 6, Chap. 145, Laws of 1835), which provides that "the real property of non-resident owners improved or occupied by a servant or agent, shall be subject to assessment of highway labor and at the same rate as resident owners," was not intended to take the place of the provisions of the Revised Statutes (1 R. S., 506, § 19 *et seq.*), in reference to the assessment of non-resident lands for highway labor, but simply to provide that lands of a non-resident occupied or improved by him, his agent or servant, should be assessed the same as resident lands, leaving non-resident lands not so occupied or improved to be assessed as provided by the former statute. *Id.*
15. The provision of said act of 1850 (Chap. 298, Laws of 1850), repealing certain portions of the Revised Statutes, but declaring that such repeal should not affect "any tax levied or assessed prior to the year 1849, nor any proceeding for the collection thereof," did not have the effect to exclude from collection, by sale of the land, a tax assessed in 1849 upon non-resident

land and returned to the comptroller prior to the passage of said act. The act simply changed the future and prospective course of proceeding for the collection of such a tax.

Id.

16. A sale in conformity with the provisions of the new act was accordingly *held* valid. *Id.*

17. Under the provision of the act of 1857 (§ 3, Chap. 456, Laws of 1857), in reference to the taxation of the capital stock of certain corporations, which provides that such stock, after certain specified deductions "shall be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county," the method of ascertaining the actual value is left to the judgment of the assessors, and they have a right to resort to any and all of the tests and measures of value which were ordinarily adopted for business purposes in estimating values. *People ex rel. v. Coleman.* 541

18. When the assessors have so exercised their judgment-it is subject to no review or correction, except as prescribed by law. *Id.*

19. Accordingly, *held*, that in making such an assessment, the assessors were not limited to the market value of said stock less the statutory exceptions, and where they took as the measure of value the "book value," *i. e.*, estimating all the assets as they appeared on the corporate books, deducting all the liabilities and other matters required to be deducted by law, that their action, if it did injustice to the corporation, was subject to review in the Supreme Court under the act of 1880 (Chap. 269, Laws of 1880); but that this court had no power to interfere with the assessment. *Id.*

ASSIGNMENT FOR (BENEFIT OF CREDITORS).

1. The members of the firm of McD., K. & Co., purchased, for the purposes of the firm business, certain real estate which was conveyed to

the individual members and thereafter used by the firm. McD. died intestate, and his interest in the real estate was sold by order of the surrogate to pay his individual debts, the purchaser conveyed said interest to E. who sold and conveyed the same to C., taking the bond of the latter, secured by mortgage on the interest purchased to secure a portion of the purchase-money. E. also caused to be conveyed to C. a third interest in the firm business, the latter covenanting to pay all the existing debts of the firm. C., with the surviving partners, formed a copartnership to carry on the business, and used and occupied the said real estate. The new firm having become insolvent, made a general assignment for the benefit of creditors, which included the said real estate. The assignees sold and conveyed the same to F., subject to all liens and incumbrances. F. took and retained possession. In an action to foreclose the mortgage so given by C. it did not appear that there were any debts of the old firm outstanding or existing at the time of the conveyance to him. *Held*, that neither C. nor F. or his grantees had any legal or equitable defense to the mortgage; that E. at the time of his conveyance to C. had an interest in the property capable of being transferred by deed, which furnished a sufficient consideration for the bond and mortgage, and that the same was a valid and subsisting lien at the time of the conveyance to F.; that no equities existed in favor of creditors giving the assignees power to question the lien of the mortgage; but even if there were, as they did not, and did not transfer any right to do so, but sold subject to existing liens, their grantees and those succeeding to his interests acquired no such right. *McConihe v. Fales.* 404

2. In January, 1873, defendant M. and one E. formed a copartnership under the firm name of M. & E., the profits of the business to be divided equally. It was agreed between E. and one F. that the latter should receive E's share of the profits with certain exceptions.

This agreement was assented to by M. upon condition that it should in no respect conflict with or affect the rights secured by the copartnership articles. After the expiration of the term of the copartnership E's connection with the business ceased and it was carried on by M. individually, but in the firm name, he retaining and using as his own the firm assets; he subsequently made an assignment to C. for the benefit of creditors. Plaintiff commenced an action against M. and F. as joint debtors, the summons in which was served upon F. Judgment was recovered and execution issued against their joint property and the individual property of F. On its return *nulla bona*, this action was brought by plaintiff as such judgment-creditor against M. and C. to set aside the assignment. The court found that F. knew of the intended assignment and ratified it. *Held*, that the complaint was properly dismissed; that the agreement between E. and F. did not make the latter a member of the firm or give him any interest in the firm business, which could be reached by a creditor of his until after the firm debts had been satisfied. *Rockefellers v. Miller.* 507

ASYLUMS.

See Soldiers' Home.

ATTACHMENT.

1. The liability of personal property situated in this state, but belonging to a non-resident, to be attached and sold under legal process is to be determined by the law of the state, not that of the jurisdiction where the owner lives. *Keller v. Paine.* 88
2. One F., a resident of Pennsylvania, on March 24, 1881, executed to plaintiffs, in that state, an instrument, in form an absolute bill of sale, but in fact given as a chattel mortgage on a canal boat owned by him, then lying in the Erie canal in the town of G. F. in this

state. An agent of the mortgagee filed a copy of the mortgage on the next day in the town clerk's office of said town, and went on board the boat and assumed possession thereof. Defendant, however, had previously on the same day, as sheriff, levied upon the boat by virtue of an attachment against F., and subsequently sold it on execution. The mortgagees and attaching creditors were also residents of Pennsylvania. In an action for a conversion of the boat *held*, that both under the provisions of the Revised Statutes relating to chattel mortgages and the act in relation to liens on canal boats (§§ 1 and 2, Chap. 412, Laws of 1864), the instrument was void and plaintiffs were not entitled to recover. *Id.*

BANKS AND BANKING.

One W. delivered to plaintiff in payment for property purchased of him, a check drawn upon defendant, signed by W. and payable to himself or order. This check defendant certified at the request of the drawer and while it was still in his possession, he at that time having funds in the bank. It was not indorsed by W. Payment of it was refused. In an action to recover the amount of the check *held*, that defendant was not liable; that the action could be supported only by proof that all of the conditions upon which the authority of the bank to pay the check was made to depend had been performed; that one of these conditions was W.'s indorsement thereon. *Lynch v. First Nat. Bk.* 179

BILLS, NOTES AND CHECKS.

1. One W. delivered to plaintiff in payment for property purchased of him, a check drawn upon defendant, signed by W. and payable to himself or order. This check defendant certified at the request of the drawer and while it was still in his possession, he at that time having funds in the bank. It was not indorsed by W. Payment of it was refused. In

an action to recover the amount of the check *held*, that defendant was not liable; that the action could be supported only by proof that all of the conditions upon which the authority of the bank to pay the check was made to depend had been performed; that one of these conditions was W.'s indorsement thereon. *Lynch v. First Nat. Bank.* 179

3. *It seems* that the certification of a check is in effect an acceptance; it amounts to a representation that the drawer has funds in the bank with which to pay the check and that it will retain and pay them to the holder; but, if the holder is the drawer, the contract between them is that the bank will pay only in accordance with the terms of the check and subject to the conditions written therein by the drawer. *Id.*

BILLS OF LADING.

1. M. D. & Co., shipped certain sugars at Manilla for New York, taking bills of lading therefor, transferable to their order on payment of the freight; these bills said firm indorsed in blank and delivered to defendant to secure the acceptance and payment of bills of exchange drawn by the consignors and discounted by defendant. The bills were accepted, and at the request of the drawees, defendant, through its New York agent, delivered the bills of lading to plaintiff, receiving his receipt therefor, which contained an agreement on his part to store the sugars as defendant's property as soon as landed in a public warehouse, delivering warehouse receipts to be retained by defendant's agent until the acceptances were paid or provided for. The intention of the arrangement, it was stated, was "to protect and preserve unimpaired the lien of the bank or its agent on said merchandise." Plaintiff was a commission merchant in New York and had acted as such for M. D. & Co., in the sale of goods sent by that firm to New York for sale. His practice had been to advance moneys to pay the

freight on goods sent by said firm to New York, when received, to sell the same, reimburse himself for the advances and account for the net proceeds. To obtain possession of the sugars on arrival, plaintiff was required to and did pay the freight; he caused them to be entered in the custom house and placed in a public warehouse, taking warehouse receipts in his own name. *Held*, that plaintiff was entitled to have the sum so paid refunded before defendant was entitled to the property; that the latter, whether regarded as pledgee or owner, had the right of possession only on payment of the freight; that plaintiff stood in no position toward M. D. & Co., which made it his duty to advance the money out of his own funds and trust to the personal credit of that firm for repayment; that the receipt required plaintiff to receive the property from the carrier on arrival and store it as the defendant's property, and when defendant thus permitted plaintiff to take the property it became obligated to repay the expenses actually and necessarily incurred by the latter in the performance of his agreement; that the agreement was fully carried out when the lien of the bank was kept exactly in the same state it was in when the arrangement was made. *Cooper v. H. K. and S. Banking Corp'n.* 282

BONA FIDE HOLDER.

The defense of want of consideration is available against an assignee of a mortgage, although he is a *bona fide* purchaser; he stands in respect to the security in the place of the assignor. *Briggs v. Langford.* 690

BONDS.

Where, pursuant to an order of the court, surplus money arising on foreclosure sale of land belonging to an intestate's estate, was paid over to a surrogate, and were by him deposited in good faith with a private banker in good standing and credit, doing a general bank.

ing business, pending proceedings to determine the parties entitled thereto, and before the termination of such proceedings the banker failed and his estate proved to be largely insolvent. *Held*, it appearing there was no negligence on the part of the surrogate, that the sureties on his official bond were not liable for the loss. *People ex rel. v. Fluikner.* 477

— *Bonds made by a railroad corporation, validity of.*

See Day v. O. & L. C. R. R. Co. 129

See TOWN BONDING.

BOUNTIES.

In November, 1866, the board of supervisors of Saratoga county, acting under the authority conferred upon such board by the acts of 1864 and 1865 (Chaps. 8 and 72, Laws of 1864; chap. 41, Laws of 1865), passed resolutions providing for raising, by taxation, a portion of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." Similar resolutions were passed each year down to 1875, and the annual accounts of the county treasurer, with the accompanying vouchers, showed that he made new loans and issued new obligations each year. In an action upon two notes given by the county treasurer to plaintiff for money loaned, which, upon their face, purported to have been issued in pursuance of said resolutions, it appeared that said officer had fraudulently overissued notes to a large amount, and that plaintiff was, with the exception of one year, a member of the board of supervisors from 1868 to 1875, and chairman of the board for several years. There was no proof that, at the time the money was borrowed, it was not needed for the purposes specified in the resolutions, or that it was misappropriated. *Held*, the presumption was that the county treasurer actually borrowed this money, as authorized, and applied it to the uses of the county; that the fact

that plaintiff was a member of the board did not make him chargeable with knowledge of the wrongs perpetrated by the county treasurer; but even if so chargeable, this would not constitute a defense. *Clark v. Suprs. Sar. Co.* 558

BRIBERY.

1. The section of the Penal Code (§ 79), declaring that any person offending against the sections thereof relating to bribery "is a competent witness against another person so offending, and may be compelled to testify upon any trial, hearing, proceeding or investigation," is not violative of the constitutional provision (State Const. art. 1, § 6), declaring that no person shall "be compelled, in any criminal case, to be a witness against himself;" as it is provided in the section not only that "the testimony so given shall not be used in any prosecution or proceeding * * * against the person so testifying" but that "the person testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution or punishment for that bribery." *People v. Sharp.* 437

2. The said section embraces legislative proceedings or investigations. *Id.*

3. Notwithstanding the vesting of judicial power in the courts, certain powers, in their nature judicial, belong to the state legislature and may be delegated to a committee, with authority to take testimony and summon witnesses, and a refusal to appear and testify in obedience to the subpoena of such a committee is a contempt, and under the Penal Code (§§ 68, 69) renders the person guilty of a misdemeanor. *Id.*

4. Where a person attends before a legislative committee in obedience to its subpoena and is sworn and examined as a witness, he cannot be deemed a willing or consenting witness, and he does not waive the privilege given by said section by

not asserting it before the committee. *Id.*

5. The terms of a preamble and resolution directing an investigation, may be looked to to determine the legislative intent. *Id.*

6. An indictment for bribery under the Penal Code (§ 78), charged the defendant with offering and giving to F., a member of the common council of the city of New York, a specified sum of money, with intent to influence him in the exercise of his powers and functions as such member, upon the application of the Broadway Surface Railroad Company for the consent of the common council to the construction of its railway. On the trial, it was proved that a bribe had been given to and accepted by F.; also, that defendant was subpoenaed as a witness and attended in obedience to the subpoena before a committee of the state senate appointed to investigate the methods adopted by the company in obtaining such consent. The preamble and resolutions appointing the investigating committee were given in evidence. The former referred to the provisions of the Constitution and the statutes relating to street railways requiring the consent of the local authorities, and recited that the charge was made that the consent to the railroad upon Broadway was obtained by fraud and through corrupt influence and bribery of members of the common council, and the committee was authorized by the resolutions to investigate fully the action of the board of aldermen of said city which granted or gave the consent "or of any member thereof who voted for the same in respect thereto." The sergeant-at-arms of the senate was directed to attend the sitting of the committee, serve subpoenas, etc. The prosecution was then allowed to prove under exception and objection the testimony so given by defendant, which tended to show his complicity in the crime. *Held*, error; that the senate had power to authorize the investigation; that the testimony was to be considered as given under compulsion; that

the case was covered by said section; and, therefore, that the testimony so given was privileged. *Id.*

7. The history of legislation in this state on the subject of bribery given. *Id.*

8. Evidence was allowed to be given on the part of the prosecution, under objection and exception, proving a corrupt proposal made, about a year prior to the offense charged, by defendant to an engrossing clerk of the assembly, to pay said clerk \$5,000 to alter a certain bill in reference to street railways, which said clerk then had in his possession, so that its terms might authorize the construction of a railroad on Broadway in said city. *Held*, error. *Id.*

9. One M., a member of the board of aldermen, called as a witness for the prosecution, testified that after the "consent" was given he received from one De L. \$5,000. After repeatedly denying any understanding on his part that it was paid on account of the Broadway Railroad Company, he was asked: "What did you think at the time, what he gave it to you for?" The witness answered, under objection and exception: "I supposed it was for the Broadway Road." *Held*, the testimony was incompetent and its reception error. *Id.*

10. The prosecution was permitted to prove, as part of the evidence in chief, by a detective officer that he had been employed by the district attorney to serve subpoenas upon certain persons named in the indictment as co-defendants, who were claimed by the prosecution to be important and material witnesses, and some of whom, especially one M., it had already been proved were intermediaries between the person giving and those receiving the bribes; that he found M. in Canada and served a subpoena upon him; that the others were in Canada also, but that witness did not see them. It was not claimed by the prosecution that defendant was privy to their absence, or that the object of the

testimony was to furnish a basis for evidence otherwise inadmissible. *Held*, that the reception of the evidence was error. *Id.*

BRIDGES.

Under and by the provisions of the acts under which the New York and Brooklyn Bridge was constructed (Chap. 899, Laws of 1867; Chap. 601, Laws of 1874; Chap. 300, Laws of 1875), the bridge belongs to the two cities of New York and Brooklyn, the trustees thereof are their agents, and those employed by the trustees are the agents and servants of the cities, for whose careless and negligent acts in performing the duties of their employment the cities are liable. *Walsh v. Mayor, etc.* 220

BROOKHAVEN (TOWN OF).

1. *It seems* the presumption is, that the title of a person in possession of upland adjoining Setauket bay, in the town of Brookhaven, Long Island, before the Nichol's patent to that town of 1868, extended to high-water mark. *Roe v. Strong.* 350
2. As to a possession originated after said patent and a title derived under it, *it seems* the cliff is the boundary on the water side, leaving a strip of land along the shore above high-water mark, which was reserved for common use. *Id.*
3. By virtue of said patent and the Dongan patent of 1686 and the confirmation thereof by the Colonial government, the said town was vested with title to the lands under the waters of the bays and harbors included within the boundaries of the patents, as well as to the uplands not already the subject of private ownership. *Id.*
4. The title to the lands under water vested in the town, subject to the public right of navigation, and *it seems* the town may not alienate the title so acquired to the material prejudice of the common right. *Id.*

5. Where, under grant made by the trustees of said town, an individual erected a wharf and a bridge over the water of the bay. *Held*, that if the grant was unlawful and the construction an unlawful obstruction of navigation, the wrong could not be redressed by action brought by an individual who had suffered no special injury; that plaintiffs in such an action had no standing unless they established that the title of the town had been divested and had been acquired by them. *Id.*

6. In an action of trespass to recover damages for the erection of the wharf and bridge, plaintiffs claimed under an unrecorded deed executed by S. in 1768, which purported to convey "a certain piece of salt thatch" by lines which included the *locus in quo*. Plaintiffs proved that from time to time the grantees under the deed cut the salt thatch growing on the premises, and that one of them leased to another the right to cut thatch; there was no evidence that the town in any way ever recognized any title under the deed, or that it had any notice of it. The premises were never enclosed, but remained open, subject, without obstruction, to the ebb and flow of the tide and to the uses of a public landing place. It also appeared that the trustees of the town exercised jurisdiction over the part of the shore in question and inconsistent with the claim of title made by plaintiffs. *Held*, the evidence failed to show any title by adverse possession; that assuming the town was cognizant of the acts of S. and his grantees in cutting the thatch, that they claimed an exclusive right and that it acquiesced therein, this, at most, gave plaintiffs simply a prescriptive right as against the town to take the thatch; it did not confer a title to the soil. *Id.*

BROOKLYN (CITY OF).

Under and by the provisions of the acts under which the New York

and Brooklyn Bridge was constructed (Chap. 399, Laws of 1867; Chap. 601, Laws of 1874; Chap. 300, Laws of 1875), the bridge belongs to the two cities of New York and Brooklyn, the trustees thereof are their agents, and those employed by the trustees are the agents and servants of the cities, for whose careless and negligent acts in performing the duties of their employment the cities are liable. *Walsh v. Mayor, etc.* 220

BURDEN OF PROOF.

Where it is shown that the consideration expressed in an instrument, not under seal, was not actually given or promised, and a party claims there was some other consideration, it is incumbent upon him to show it. *Fargis v. Walton.* 398

CANAL BOATS.

One F., a resident of Pennsylvania, on March 24, 1881, executed to plaintiffs, in that state, an instrument in form an absolute bill of sale, but in fact given as a chattel mortgage on a canal boat owned by him, then lying in the Erie canal in the town of G. F. in this state. An agent of the mortgagee filed a copy of the mortgage on the next day in the town clerk's office of said town, and went on board the boat and assumed possession thereof. Defendant, however, had previously on the same day, as sheriff, levied upon the boat by virtue of an attachment against F., and subsequently sold it on execution. The mortgagee and attaching creditors were also residents of Pennsylvania. In an action for a conversion of the boat *held*, that both under the provisions of the Revised Statutes relating to chattel mortgages and the act in relation to liens on canal boats (§§ 1 and 2, Chap. 412, Laws of 1864), the instrument was void and plaintiffs were not entitled to recover. *Keller v. Paine.* 83

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CATTARAUGUS (COUNTY OF).

— *As to collection of taxes in.*
See Ensign v. Barse. 329

CAUSE OF ACTION.

1. *It seems that one duly qualified to vote, as provided by the Consti-*

tution (art. 2 § 1), cannot be deprived of that right by any inferior tribunal; the officers presiding at an election determine the question at their peril, and are liable to him in damages, in case of an erroneous determination that he is disqualified, and a rejection of his vote. *Sileo v. Lindsay.* 55

2. Plaintiff's complaint alleged, in substance, that A. died seized of certain real estate which he devised to his two sons, J. and F., subject to the limitation as to F. that if he should die without issue his share should go to J. and his heirs; that F. conveyed his interest to defendant, who subsequently induced C., plaintiff's mother, to marry F. by means of the false and fraudulent representations that F. had a fine property so left to him that if he married and had an heir the land would go to the heir. The complaint further alleged that plaintiff was the only child of such marriage; that the real estate was partitioned between J. and defendant as the grantee of F., and defendant since then has occupied and still occupies and claims to own the part set off to him. The relief asked was that plaintiff be declared the owner of the portion so set off to defendant and be placed in possession thereof. On demurrer to the complaint *held*, that it set forth a good equitable cause of action and the demurrer was properly overruled; that defendant was bound by his representations and must be considered as holding the property as trustee *ex maleficio*; and so, should be held to make good the thing to plaintiff, who would have had the property had the representations been true; that it was immaterial that plaintiff was not living at the time the representations were made, as they were made in her favor and enure to her benefit; and that the question was not affected by the fact that plaintiff's mother was induced to agree to the marriage by purely mercenary considerations. *Piper v. Hoard.* 78

3. An action is maintainable by a riparian owner for a diversion of the waters of a stream by the owner

on the opposite side which materially diminishes the natural flow and, at times, takes substantially all of the water from the stream. *N. Y. Rubber Co. v. Rothery.* 310

4. Where, before the time of delivery fixed by a contract of sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods, and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time and is entitled to bring an action immediately for the breach, without tendering delivery; it is not necessary for him to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract, after the vendor has acted upon it, and, by sale of the goods to other parties, changed his position. *Windmuller v. Pope.* 674

— *Action maintainable on behalf of town by its supervisor, to recover damages against one aiding in fraudulent organizations of railroad corporation, and in obtaining town bonds which he has transferred to bona fide holders, and so made the town liable thereon.*

See Furnham v. Benedict. 159

CHAUTAUQUA (COUNTY OF.)

— *As to collection of taxes in.*

See Ensign v. Bares 329

CHATTEL MORTGAGE.

One F., a resident of Pennsylvania, on March 24, 1881, executed to plaintiff, in this state, an instrument, in form an absolute bill of sale, but in fact given as a chattel mortgage on a canal boat owned by him, then lying in the Erie canal in the town of G. F., in this state. An agent of the mortgagee filed a copy of the mortgage on the next day in the town clerk's office of said town, and went on board the boat and assumed possession thereof. Defendant, however, had previously, on the same day, as

sheriff, levied upon the boat by virtue of an attachment against F., and subsequently sold it on execution. The mortgagee and attaching creditors were also residents of Pennsylvania. In an action for a conversion of the boat *held*, that both under the provisions of the Revised Statutes relating to chattel mortgages and the act in relation to liens on canal boats (§§ 1 and 2, Chap. 412, Laws of 1884), the instrument was void and plaintiffs were not entitled to recover. *Keller v. Putne.* 88

CHECKS.

See BILLS, NOTES AND CHECKS.

CLOUD ON TITLE.

1. The provision of the Code of Civil Procedure (§ 882, sub. 5), applying a six years limitation to actions "to procure a judgment other than for a sum of money on the ground of fraud, in a case," formerly "cognizable by the Court of Chancery," does not apply to an action by the owner of the fee to remove a cloud upon title to land, by the cancellation of a mortgage thereon, to which the owner has a good defense. *Schoener v. Lissauer.* 111
2. The right to bring such an action is never barred by the statute of limitations. *Id.*
3. In an action brought to procure the cancellation and discharge of a mortgage, on the ground that it had been procured by duress, the trial court found that the execution of the mortgage was procured by defendants by threats and menaces to the effect that unless the mortgagor gave it they would cause her son to be sent to State prison for larceny and embezzlement, for which he was under arrest and indictment on their complaint, they stating if their terms were complied with they would release the prisoner, if in their power, but if not complied with he would be sent to State prison; that she executed the mortgage while under

fear, terror, coercion and duress created by the threats, and that the prisoner was immediately thereafter discharged on his own recognizance. *Held*, that the findings were sufficient to sustain a judgment for the relief sought. *Id.*

CODES

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COMMON CARRIERS.

1. As to whether, in the absence of a statutory requirement, a steamship company owes a duty to its passengers to provide a surgeon to care for them in case of sickness or accident, or as to whether having voluntarily assumed that duty its position becomes identical with that of a carrier upon whom the duty is imposed by law, *quære Laubheim v. De K. N. S. M.* 228
2. Where, by law or by choice, the company has become bound to furnish such an officer, reasonable care and diligence in the selection of a person reasonably competent is all that is required, and it is liable only for a neglect of that duty. It is not compelled to select and employ the highest skill and longest experience. *Id.*

COMMON SCHOOLS.

1. A judgment recovered against the trustees of a school district, upon a contract entered into by them on behalf of the district, binds them individually, and may be collected by execution out of their individual property. (Code Civ. Pro. §§ 1927, 1929, 1931; Laws of 1864, chap. 555, tit. 13, §§ 6-11. *People ex rel. v. Abbott.* 225.
2. Where the action is defended, without any resolution of a district meeting, no obligation rests upon the district to indemnify the trustees for costs, charges and expenses until a district meeting shall have found in favor of the claim and voted that a tax be assessed and collected for its payment, or unless, on appeal from a refusal of the meeting to vote a tax, it shall be decided that the account in whole or in part ought justly to be charged upon the district. *Id.*
3. Where, therefore, an action was brought against school trustees to recover the salary of a teacher, which was defended by them without direction or instruction of a district meeting, and judgment was recovered against them, which was

affirmed on appeal, *held*, that, in the absence of any action on the part of the district at any district meeting, or application by the trustees to the county judge to have the costs and expenses allowed, a writ of *mandamus* was improperly issued directing the trustees to forthwith pay the costs embraced in the judgment, or deliver to the plaintiff in the action an order on the collector of the school district for the amount thereof. *Id.*

COMPOSITION.

See DEBTOR AND CREDITOR.

CONFLICT OF LAWS.

1. The liability of personal property situated in this state, but belonging to a non-resident, to be attached and sold under legal process, is to be determined by the law of the state, not that of the jurisdiction where the owner lives. *Keller v. Paine.* 83
2. The general rule that the voluntary transfer of personal property wheresoever situated is to be governed by the law of the owner's domicile, always yields where the law and policy of the state where the property is actually located have provided a different rule of transfer from that of the state where the owner lives. *Id.*
3. The provisions of the statutes of this state in reference to testamentary guardians relate exclusively to domiciliary guardianship under wills or deeds of residents of this jurisdiction. The rights and powers of the guardian are strictly local, and circumscribed by the jurisdiction of the government which clothed him with his office. *Wuesthoff v. Germania L. Ins. Co.* 580
4. *It seems*, however, that a payment by a debtor in this state to a foreign guardian will be good, if the guardian, by the law of the state from which he derives his appointment, is authorized to receive it. *Id.*

5. Defendant issued a policy of insurance on the life of W., payable to A., his wife. In case of her death before the death of the insured the policy provided that the amount of insurance "shall be payable to her children * * * or to their guardian, if under age." W. resided in New Jersey, where the policy was issued, and continued so to do up to the time of his death. He survived his wife and remarried. By his will he appointed his second wife guardian of his children by the first wife, who were infants. She, as such guardian, served on defendant notice and proof of the death of W., and of his first wife, and defendant thereupon paid to her the amount of the policy. The laws of New Jersey provide that a father may, by deed or will, appoint a guardian for his minor children (N. J. R. S. 664, § 1), but by another section (p. 762, § 48), provide that every testamentary guardian "shall, before he exercises any authority over the minor or his estate, appear before the Orphans' Court and declare his acceptance of the guardianship * * * and shall give bond * * * for the faithful execution of his office unless it is otherwise directed by the testator's will." The guardian, at the time of receiving payment on the policy, had not declared her acceptance of the guardianship or given a bond as required. In an action by the children to recover the amount of the policy, *held*, that the case was to be governed by the laws of New Jersey; that the giving of security was a necessary prerequisite to the exercise of any authority by the guardian over the estate of the ward; that the guardian, therefore, was not authorized to receive payment, and that such payment was not a defense to the action. *Id.*

CONSIDERATION.

Where it is shown that the consideration expressed in an instrument, not under seal, was not actually given or promised, and a party claims there was some other consideration, it is incumbent upon

him to show it. *Fargis v. Walton.* 398

CONSTITUTION.

1. *It seems* that one duly qualified to vote, as provided by the Constitution (art. 2, § 1), cannot be deprived of that right by any inferior tribunal; the officers presiding at an election determine the question at their peril, and are liable to him in damages, in case of an erroneous determination that he is disqualified, and a rejection of his vote. *Silvey v. Lindsay.* 55
2. An *ex parte* order was made by a justice of the Supreme Court for the examination of one of defendant's officers before trial. Upon motion made before another justice on the papers on which the order was granted, and other affidavits and papers, the order was vacated. The justice who granted the first order was a member of the General Term which heard an appeal from the second order. *Held*, that as the first order was not under review by the General Term, the objection the court, as constituted, was violative of the constitutional prohibition against a judge or justice sitting in General Term in review of a decision made by him was not tenable. (State Const., § 8, art. 6.) *Philips v. Germania Bank.* 630

CONSTITUTIONAL LAW.

1. A railroad confined within the limits of a city and proposed to be built exclusively under the surface of the street thereof, is a street railway within the meaning of the provision of the State Constitution (art. 8, § 18), declaring that no law shall authorize the construction of a street railroad except upon the condition of the consent of the owners of one-half in value the property bounded on and the consent also of the local authorities having control of the street, or in lieu of the consent of the property holders, in case it cannot be obtained, the determination of commissioners appointed by the

court that the road ought to be constructed. *In re N. Y. Dist. R. R. Co.* 43

2. As applicable to such a road, therefore, the provision of the act of 1880 (Chap. 583, Laws of 1880), in reference to underground street railways, declaring that the determination of commissioners, confirmed by the court, "may be taken in lieu of the consent of said authorities," is unconstitutional and invalid. *Id.*

3. *It seems*, the act of 1880 (Chap. 577, Laws of 1880), purporting to release the Attica and Arcade Railroad Company from a forfeiture of its charter, is violative of the constitutional provision (State Const., art. 3, § 18), prohibiting the legislature from passing any local or private act granting to any corporation or association the right to lay down railroad tracks. *Furnham v. Benedict.* 159

4. Certain of the heirs of G. procured the passage of an act (Chap. 377, Laws of 1885), entitled "An act to release the interest of the People of the State of New York in certain real estate to * * * (said heirs), and for other purposes." Its first section purports to release to the persons named in the title the interest which the State acquired by escheat in certain real estate described. The second section assumes to release to said persons all interest which the State has in the personal property, of which E. died possessed of, or was entitled to. *Held*, that the act was violative of the provision of the State Constitution (art. 3 § 16), which declares "that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." *Johnston v. Spicer.* 185

5. The act of 1882, entitled "an act to amend chapter 229 of the Laws of 1879, entitled 'an act in reference to the collection of taxes in the counties of Chautauqua and Cattaraugus,' and the act amendatory thereof and supplemental thereto" (Chap. 287, Laws of 1882)

is not violative of the provision of the State Constitution (art. 3, § 16) which declares no private or local act shall embrace more than one subject and that shall be stated in the title; the subject stated embraces the entire system of collection, including the sale of lands to enforce collection, the conveyances and their force as evidence and muniments of title. *Ensign v. Barre.* 339

6. Said act of 1882 is not repugnant to the provision of said constitution (art. 1, § 6), or of the federal constitution declaring that no person shall be deprived of life, liberty or property without due process of law. *Id.*

7. The provision of said act (§ 2) declaring that whenever a period of fifteen years shall have elapsed after a conveyance, on a tax sale, of the lands of a non-resident lying in said counties, and the former owner or claimant shall not have entered into possession within that period, the conveyance shall be conclusive evidence that the sale and the proceedings prior thereto were regular, etc., was not intended to and does not cure jurisdictional defects of such a nature as that the legislature could not have dispensed with the statutory requirement, a failure to comply with which constitutes the defects. *Id.*

8. The section of the Penal Code (§ 79), declaring that any person offending against the sections thereof relating to bribery "is a competent witness against another person so offending, and may be compelled to testify upon any trial hearing, proceeding or investigation," is not violative of the constitutional provision (State Const., art. 1, § 6), declaring that no person shall "be compelled, in any criminal case, to be a witness against himself," as it is provided in the section not only that "the testimony so given shall not be used in any prosecution or proceeding * * * against the person so testifying," but that "the person testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment,

prosecution or punishment for that bribery." *People v. Sharp*. 427

9. The act of 1885 (Chap. 499, Laws of 1885), entitled "an act providing for placing electrical conductors under ground in cities of this state and for commissioners of electrical subways," is not violative of the provision of the state Constitution (Art. 3, § 16), declaring that no local or private bill shall embrace more than one subject, and that shall be expressed in the title. Said act is not a local or private bill within the meaning of the constitutional provision, and it embraces but one subject which is fairly expressed in the title *People ex rel. v. Squire*. 593

10. A law, general in its terms, regulating the operation of all corporations of a certain kind in cities of a certain class is not made a local or private bill by the fact that such companies are all located in, or that the specified class of cities include but one or a limited number of the cities of the state. *Id.*

11. The fact that said act (§ 2) charges the board of commissioners of electrical subways, thereby directed to be appointed, with the duty of enforcing the provisions of the act of 1884 (Chap. 534, Laws of 1884), and declares that the said act of 1884 is thereby amended so as to conform to the provisions of the act of 1885, does not render the latter act obnoxious to the constitutional provision (Art. 3, § 17), declaring that no act shall be passed providing that any existing law shall be deemed part thereof or applicable thereto, "except by inserting it in said act." *Id.*

12. The fact that said act of 1885 directs that the costs and expenses of each board of commissioners appointed under it shall be assessed upon the companies "operating electrical conductors in the city," does not render the act void as imposing a tax upon the companies specified without consent, hearing or benefit, in violation of the Constitution. (Art. 1, § 5.)

No tax is imposed within the meaning of the Constitution. *Id.*

13. *It seems* that, conceding said provision in relation to assessments does impose a tax, it does not necessarily invalidate the other provisions of the statute. *Id.*

14. The said act of 1885, so far as it affects corporations organized before its passage, is not obnoxious to the constitutional prohibition against laws impairing the obligations of contracts; it does not annul, destroy, or materially impair or restrict any franchises or contract rights previously secured, but seeks to regulate and control their exercise, so that they shall cease to constitute a public nuisance. *Id.*

15. Regulations of the character provided for in said acts are strictly police regulations, such as are within the legitimate authority of the legislature to delegate the exercise thereof to municipal corporations. *Id.*

CONTRACT.

1. The contract for the sale of real estate called for a frontage of twenty-eight feet two inches "more or less," the deed tendered, twenty-eight feet more or less; the same description of the property was given in both, bounding it on either side by the walls of adjoining tenements. *Held*, that in such a case quantity was not a material part of the description. *Moser v. Cochran*. 85

2. The distinction between the legal and equitable rules applicable to contracts and negotiations in reference to marriage, and those as to other matters pointed out. *Piper v. Hoard*. 73

3. Ante-nuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts and will be enforced in

- equity according to the intention of the parties. *Johnston v. Spicer.* 185
4. In order to effectuate such intention courts of equity will impose a trust upon the property agreed to be conveyed, commensurate with the obligations of the contract. *Id.*
5. It is immaterial whether a trustee is appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired. *Id.*
6. The contract also will be enforced in equity to accomplish the object the parties had in view, without reference to the validity of the agreement at law. *Id.*
7. A creditor who, in executing a composition agreement, has been guilty of fraud in respect to the other compounding creditors, by secretly stipulating for a preference to himself, may not avoid the agreement, because of a similar fraud practiced upon him. *White v. Kuntz.* 518
8. The composition agreement is only void as to the innocent creditors executing it. *Id.*
9. *It seems* an innocent creditor, upon repudiating the composition agreement, is restored to the right to enforce his original claim. *Id.*
10. Any contract or promise, whereby one of the compounding creditors secretly secures to himself an advantage over the others, and any security given upon any such contract or promise, is void. *Id.*
11. *It seems* an agreement by a third person with an out-going member of a firm to relieve him from and indemnify him against the firm debts, where no consideration passed to the promissor, cannot be enforced against him by a creditor of the firm. *Berry v. Brown.* 659
12. *It seems*, also, such an oral agreement is void under the statute of frauds. *Id.*
18. Where a married couple had separated, and pending an action for limited divorce brought by the wife against the husband, a settlement was agreed upon between them, and a contract entered into in pursuance thereof, to the effect that the property of the husband should be sold, and after payment of his debts, one-third of the proceeds remaining should be paid to the wife, and that they should live separate. *Held*, that the contract was valid, and an action was maintainable to recover the portion of the proceeds so agreed to be paid to her. *Pettit v. Pettit.* 677
- *Contract made by railroad corporation, validity of.*
Day v. O. and L. C. R. R Co 120
- *Where vendor notifies vendee that he will not fulfill contract of sale of goods, the vendee is not required to make any demand or serve notice to deliver before suit for breach of contract.*
See Robinson v. Frank (Mem.) 655
- *When future profits proper to be considered on question of damages for breach of partnership agreement.*
See Dart v. Laimbeer (Mem.). 664
- SEE BILLS OF LADING.
GUARANTY.
SALES.
- CORPORATION.
1. Under the provision of the act of 1857 (§ 8, chap. 456, Laws of 1857), in reference to the taxation of the capital stock of certain corporations, which provides that such stock, after certain specified deductions, "shall be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county," the method of ascertaining the actual value is left to the judgment of the assessors, and they have a right to resort to any and all of the tests and measures of value which were ordinarily adopted for business purposes in estimating values. *People ex rel. v. Coleman.* 641

2 When the assessors have so exercised their judgment it is subject to no review or correction, except as prescribed by law. *Id.*

3 Accordingly, *held*, that in making such an assessment, the assessors were not limited to the market value of said stock less the statutory exceptions, and where they took as the measure of value the "book value," *i. e.*, estimating all the assets as they appeared on the corporate books, deducting all the liabilities and other matters required to be deducted by law, that their action, if it did injustice to the corporation, was subject to review in the Supreme Court under the act of 1880 (Chap. 269, Laws of 1880); but that this court had no power to interfere with the assessment. *Id.*

— *When order appointing receiver under New Jersey statute providing for appointment of receiver "when any corporation shall be dissolved," was proved, held, that in absence of proof that the order was an interlocutory one, or of some other law under which receiver might be appointed, which was consistent with life of corporation, action was not maintainable in name of corporation.*

See M. L. and T. Co. v. Clair (Mem.). 668

See ELECTRICAL COMPANIES.
INSURANCE (LIFE).
INSURANCE (MARINE).
MANUF'ING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.

COSTS.

— *When case not one for extra allowance under the Code of Civil Procedure (§§ 32, 52).*

See Smith v. Rector, etc. 610

COUNTER-CLAIM.

This action was brought by a purchaser of real estate to recover back the portion of the purchase-price paid by him on execution of the contract of sale on the ground

that defendant inherited the property from C., who died within three years intestate; that the administration of his estate had not been closed and plaintiff would have to take the property, subject to the debts of the intestate, if any there should be after his personal estate was exhausted, also to the possibility of the discovery of a will within four years after the death which would govern the disposition and render a conveyance void. Defendant's answer admitted the execution of the contract set forth in the complaint, and as a counter-claim averred readiness and offer to perform on his part and tender of a deed, and asked for a specific performance. *Held*, that the case was brought within the provisions of the Code of Civil Procedure (§§ 501, 502) in reference to counter-claims, and upon establishing the facts alleged defendant was entitled to the affirmative relief sought. *Moser v. Cochran.* 85

COUNTIES.

— *Where county treasurer was authorized to borrow money for county and issue its obligations therefor. In an action against county, upon notes for money loaned, purporting to have been given pursuant to such authority, held, the presumption, in the absence of proof to the contrary, was that the money was borrowed as authorized and applied to the use of the county, and the fact that the county treasurer had fraudulently overissued notes to a large amount was no defense; also, the fact that the plaintiff was a member of the board of supervisors did not charge him with notice of the wrongs perpetrated by the county treasurer.*

See Clark v. Board of Suprs. 558

See CATTARAUGUS (COUNTY OF).
CHAUTAUQUA (COUNTY OF).

COUNTY TREASURER.

In November, 1866, the board of supervisors of Saratoga county, acting under the authority conferred upon such board by the acts of 1864 and 1865 (Chaps. 8 and 72,

Laws of 1864; chap. 41, Laws of 1865), passed resolutions providing for raising, by taxation, a portion of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." Similar resolutions were passed each year down to 1875, and the annual accounts of the county treasurer, with the accompanying vouchers, showed that he made new loans and issued new obligations each year. In an action upon two notes given by the county treasurer to plaintiff for money loaned, which, upon their face, purported to have been issued in pursuance of said resolution, it appeared that said officer had fraudulently over-issued notes to a large amount, and that plaintiff was, with the exception of one year, a member of the board of supervisors from 1863 to 1875, and chairman of the board for several years. There was no proof that at the time the money was borrowed, it was not needed for the purposes specified in the resolutions, or that it was misappropriated. *Held*, the presumption was that the county treasurer actually borrowed this money, as authorized, and applied it to the uses of the county; that the fact that plaintiff was a member of the board did not make him chargeable with knowledge of the wrongs perpetrated by the county treasurer; but even if so chargeable, this would not constitute a defense. *Clark v. Suprs.* 533

COURTS.

See COURT OF APPEALS.
COURTS OF SESSIONS.
SUPERIOR COURT (BUFFALO).
SURROGATE'S COURT.

COURT OF APPEALS.

See APPEAL.

COURTS OF SESSIONS.

1. Where an indictment is found in a court of Oyer and Terminer, to

give jurisdiction to the Court of Sessions to try it, there must be an order of the Oyer and Terminer remitting it to the Sessions for trial. *People v. Bradner.* 1

2. To sustain, however, upon appeal, a judgment of the Court of Sessions on trial of such an indictment, it is not essential that the record should affirmatively show that such an order was made; in the absence of proof to the contrary this will be presumed. The Court of Sessions is a superior court and its jurisdiction is presumed. *Id.*
3. The distinction between limitation of jurisdiction and inferiority of jurisdiction pointed out. *Id.*
4. The history of Courts of Sessions given. *Id.*

COVENANTS.

1. A covenant in restraint of trade is valid if it imposes no restriction upon one party, which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into, and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee. *Hodge v. Sloan.* 244
2. Where a grantee binds himself by a covenant in his deed, limiting the use of the land purchased in a particular manner so as not to interfere with the trade or business of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor, taking title with notice of the restriction; and this, although the assignees of the covenantor are not mentioned or referred to. It is not necessary that the covenant should be one technically running with the land; it is sufficient that the purchaser has notice of it. *Id.*
3. N. was the owner of certain lands containing deposits of building sand and the sale of the sand constituted his only business. S. offered to purchase a small parcel

of the land, but N. declined to sell on the ground that it would interfere with his business. S. agreed to purchase, covenanting not to sell any sand off from the parcel. N. thereupon sold and conveyed, his deed containing such a covenant on the part of the grantee. S. subsequently conveyed by warranty deed, to defendant, without covenants on the part of the latter, who, however, had notice before taking his deed of the covenant in the deed to his grantor. Defendant opened a pit on his land, sold sand therefrom and declared that he should continue to sell notwithstanding such covenant. *Held* (ANDREWS and EARL, JJ., dissenting), that an action was maintainable to restrain such sale. *Id.*

CREDITOR'S SUIT.

In January, 1878, defendant M. and one E. formed a copartnership under the firm name of M. & E., the profits of the business to be divided equally. It was agreed between E. and one F. that the latter should receive E's share of the profits with certain exceptions. This agreement was assented to by M. upon condition that it should in no respect conflict with or affect the rights secured by the copartnership articles. After the expiration of the term of the copartnership E's connection with the business ceased and it was carried on by M. individually, but in the firm name, he retaining and using as his own the firm assets; he subsequently made an assignment to C. for the benefit of creditors. Plaintiff commenced an action against M. and F. as joint debtors, the summons in which was served upon F. Judgment was recovered and execution issued against their joint property and the individual property of F. On its return *nulla bona*, this action was brought by plaintiff as such judgment-creditor against M. and C. to set aside the assignment. The court found that F. knew of the intended assignment and ratified it. *Held*, that the complaint was

properly dismissed; that the agreement between E. and F. did not make the latter a member of the firm or give him any interest in the firm business, which could be reached by a creditor of his until after the firm debts had been satisfied. *Rockafellow v. Miller.* 507

CRIMINAL TRIAL.

1. Where an indictment is found in a Court of Oyer and Terminer, to give jurisdiction to the Court of Sessions to try it, there must be an order of the Oyer and Terminer remitting it to the Sessions for trial. *People v. Bradner.* 1
2. To sustain, however, upon appeal, a judgment of the Court of Sessions on trial of such an indictment, it is not essential that the record should affirmatively show that such an order was made; in the absence of proof to the contrary this will be presumed. The Court of Sessions is a superior court, and its jurisdiction is presumed. *Id.*
3. The distinction between limitation of jurisdiction and inferiority of jurisdiction pointed out. *Id.*
4. The history of Courts of Sessions given. *Id.*
5. *It seems* that an arraignment and plea are necessary, preliminary to a legal trial upon an indictment (Code Crim. Pro., §§ 296, 310.) *Id.*
6. A formal plea of not guilty, however, is not necessary to put the defendant on trial; a demand of trial by him is equivalent to such a plea. *Id.*
7. The record herein stated that "defendant on arraignment pleaded not guilty," and that thereafter, by leave of the court, he withdrew his plea and moved to dismiss the indictment. The record then contained the decision of the court denying the motion; a statement of the proceedings and evidence on trial, which showed that defendant was present with his counsel

- and took part in the trial; also, the finding of a verdict of guilty. *Held*, it was to be inferred that all parties regarded the plea as withdrawn for the purpose of the motion only, and that it was reinstated when the motion was denied. *Id.*
8. A motion for a new trial in a criminal action, on the ground of newly discovered evidence, can only be granted where the motion is made before judgment. (Code of Crim. Pro., §§ 463, 466.) *Id.*
9. The omission of the clerk in his entry of judgment in a criminal action to state the offense for which the conviction was had, as required by the Code of Criminal Procedure (§ 485), does not render the sentence void. The defect is amendable, and, upon appeal to this court, other parts of the record may be referred to, and if they furnish evidence of the fact so omitted in the entry, the court may conform the entry to the fact. (§ 543.) *Id.*
10. As to whether, in order to justify the detention of a defendant under said Code (§ 496), it is necessary that the entry in the minutes, with a copy of which he is to be furnished, should show the offense, *quære*. *Id.*
11. An indictment for larceny charged among other things, that defendant, as agent of an insurance company, drew upon the general agent of said company, duly authorized by it to pay in case the drawer was lawfully entitled to draw the draft, for \$4,975, when defendant and his firm, to his knowledge, were not lawfully entitled to draw for that or any other sum, and by color and aid of such draft he obtained of it the sum specified. *Id.*
12. Upon the trial of the indictment *McD.*, the general agent upon whom the draft was drawn by defendant, was called as a witness by the People. On cross-examination he was questioned as to a civil action commenced by the insurance company against defendant, in which he had verified the complaint. He was asked what he swore to as to a particular matter, and gave answers showing that the complaint contained an allegation somewhat at variance with his testimony on direct-examination. After redirect-examination the district attorney offered in evidence a copy of the complaint. The court received it in evidence for the purpose of showing what the witness had sworn to, stating that it could not "be evidence upon any other point." The complaint contained thirteen counts, only one of which related to the matter inquired of on cross-examination. *Held*, that the ruling was not error; that, while the whole complaint was not competent, the district attorney had the right to prove the whole and to read so much of it as related to the cross-examination, and which tended to explain or qualify the testimony so elicited; and that a fair construction of the ruling of the trial judge was that he received the complaint only for the purpose of showing what *McD.* had testified as to the matter inquired of upon the cross-examination. *People v. Dimick*. 13
13. Even if a single phrase of the charge of a court in a criminal action, isolated from the rest of the charge, is found to be erroneous, the judgment should not, on that account, be reversed, if the whole charge properly instructed the jury, and it can be seen, with reasonable certainty, that the erroneous portion did not mislead the jury or influence the verdict. *Id.*
14. The evidence showed that defendant's firm had the agency in Buffalo for four insurance companies, one of them the C. Ins. Co.; that he insured the cargo in question in that company, but after he was advised of the loss changed it to one of the other companies. The People were allowed to give evidence, under objection and exception, that defendant had during the same season, in several instances after knowledge of a loss, insured against in the C. Co., changed the insurance to one of the other companies for the purpose of shielding the C. Co. *Held*,

- no error; that the evidence was proper on the question of motive and intent; also that, although the proof as to the other crimes was inconclusive, the People had the right to give it and have it submitted to the jury with proper instructions. *Id.*
15. The evidence showed that defendant drew upon McD., at New York, for the sum stated in the indictment, at three days sight; that the draft was sent to a bank in that city, and by it presented to McD., who paid it by giving a check upon another bank. It was claimed by defendant that the proof did not sustain the indictment, in that it charged that he obtained "money" by the fraud alleged, while the proof showed that the company parted with a draft instead of money. *Held*, untenable; that the bank presenting the draft must be deemed to have been defendant's agent, and payment to it was payment to him, and the bank upon which the check was drawn was to be treated as the agent of the insurance company in making the payment; and so, money was paid to defendant. *Id.*
16. It was further objected on the part of defendant that the conviction was erroneous as the proof failed to show that the crime was committed in Buffalo. *Held*, untenable; that it was partly committed in that city and partly in New York, and so the case came within the provision of the Code of Criminal Procedure (§ 184), declaring that "when a crime is committed partly in one county and partly in another * * * the jurisdiction is in either county." *Id.*
17. The indictment was found in the Superior Court of Buffalo. It was claimed by defendant that, under the provision of said Code, defining the jurisdiction of that court (§ 28), which declares that it may inquire "by a grand jury of all crimes committed in the city of Buffalo," and may "try and determine all indictments found therein, or sent there by another court, for a crime committed in that city," the said court had no jurisdiction. *Held*, untenable; that the grand jury was clothed with power to determine both the facts and the law, and as it did inquire and determine that the crime was committed in the city of Buffalo there was no way of reviewing its determination unless by motion to quash the indictment or to arrest judgment; that under the plea of not guilty the only question was as to defendant's guilt and the jurisdiction of the court to try that question. *Id.*
18. The indictment herein charged defendant with perjury in verifying a quarterly report made by a State bank, of which he was cashier, to the banking department. The verifying affidavit was set forth in the indictment, which charged that defendant, at the time of making the affidavit, had full knowledge of the real and true condition of the bank and of the matters stated in the report, and that he well knew, when he swore to the affidavit, that the report and accompanying schedules were false and untrue, but wickedly and corruptly swore that they were true to the best of his knowledge and belief. The indictment then set forth specifically several statements contained in the report, in respect to each of which it averred that defendant well knew, at the time he swore to the report, that said statement was not true according to the best of his knowledge and belief, and that the fact was otherwise than as stated, specifying the difference. It was objected that the indictment was defective, in that it did not directly allege that the statements in the report were, as matter of fact, untrue. *Held*, untenable; that the averments in the indictment amounted to an allegation that the statements were false. *People v. Clements*. 205
19. Defendant interposed a general demurrer to the indictment. *Held*, that, conceding it was technically defective in the form of the allegations, the objection could not be raised by demurrer under the Code of Criminal Procedure (§ 323), nor did the defect render the indictment insufficient (§ 285). *Id.*

20. *It seems* that, under the common-law system of pleading, such an objection can only be taken advantage of by special demurrer; it is not available on general demurrer or on motion in arrest of judgment. *Id.*

21. Under the provision of the Code of Criminal Procedure (§ 528, as amended by Chap. 493, Laws of 1887), vesting in the Court of Appeals jurisdiction to examine the record on appeal in a criminal action "where the judgment is of death," and to determine upon the whole case whether "the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," the defendant is not given and may not claim, as matter of right in this court, the benefit of errors occurring on the trial; the failure to make proper objections and take exceptions deprives them of that right; the court is simply vested with a power in its discretion to disregard the neglect and without regard to exceptions to review the case upon the merits. *People v. Driscoll.* 414

22. Where, therefore, evidence was received or rejected without objection, on the trial in such an action, which if proper objections and exceptions had been taken, would have required a reversal, the court is not bound to reverse, and is only authorized to do so, in its discretion, where it appears affirmatively from the whole case, that injustice has been done to the accused in the result arrived at by the trial court. *Id.*

23. On the trial an indictment for murder, wherein it was claimed by the prosecution that the deceased was shot by defendant, on the cross-examination of one McM. the defendant was permitted to prove that immediately after the shooting the injured person stated in the presence of McM. and others, that McM. had shot her. *Held*, it was competent for the prosecution to prove that McM., at the time, denied the charge, produced

his pistol, and delivered it to an officer present; also, that the pistol was fully loaded, and its barrel cold. *Id.*

24. A witness, who testified to these facts in regard to the pistol, added that the pistol bore no appearance of having been fired off. Defendant's counsel moved to strike out the whole evidence. *Held*, the motion was properly denied; that if the inference the witness drew from the facts was alone intended to be excluded by the motion, it should have been particularly referred to; that, as made, the motion called for too much, and was properly denied. Also, that the inference of the witness was immaterial and could have done no injury. *Id.*

See BRIBERY.

DAMAGES.

1. Plaintiff leased certain premises, which had been occupied as a dwelling-house to defendant, to be used as a public school. The requisite alterations in the interior were permitted by the lessor and the lessee covenanted to make them and also to surrender the premises at the expiration of the lease "in the same condition as they were at the execution of this lease, reasonable use and wear thereof as a public school and damages by the elements excepted." The lessees changed the dwelling-house into school rooms removing partitions, etc. This lease was followed by three others in similar form, each executed before the termination of the preceding one. After the termination of the last lease and the surrender of the premises, this action was brought, among other things, to recover damages for a breach of the covenants as to condition on surrender. Plaintiff proved that the premises were in good condition when leased, and that when surrendered the walls, floor and glass in the windows were broken, the basement filled with refuse and the sidewalk broken by dumping coal thereon, some of the balusters of the stairs

gone, etc. *Held*, that defendant was not bound to restore the premises to their former condition as a dwelling-house; but that the evidence showed other damages, and the question as to whether or not they resulted from a reasonable use of the premises for school purposes was one of fact, and a submission of the same to the jury was proper. *McGregor v. Ed. Ed'n.* 511

2. Also, *held*, that plaintiff was not required to show the separate damage at the end of each term; it was sufficient to prove a breach of covenant referable to one or more or all of the leases. *Id.*

3. Upon breach by an employer of a contract of employment, by a discharge of the employe before the expiration of his term of service, the latter is only bound to use reasonable diligence to procure other employment of the same kind in order to relieve the employer as much as possible from loss consequent upon the breach; he is not bound to look for or accept occupation of another kind. *Fuchs v. Koerner* 529

4. In an action to recover damages for personal injuries caused by defendant's negligence, where no evidence is given as to the circumstances and condition in life of the plaintiff, his earning power, skill and capacity, no damages for future pecuniary loss can be awarded. *Staal v. Gd. St. etc. R. R. Co.* 625

5. The ordinary rule of damages in an action to recover for breach by vendor of contract for sale of goods, is the difference between the contract price and the market value of the property at the time and place of delivery. *Windmuller v. Pope* 674

—When future profits proper to be considered on questions of damages for breach of partnership agreement. *Dart v. Laimbeer (Mem.)* 664

See MEASURE OF DAMAGES.

SICKELS—VOL. LXII.

DEBTOR AND CREDITOR.

1. An incoming partner can only be made liable by agreement for the prior debts of the firm, whether he succeeds an outgoing partner by purchase, or whether, upon the death of one partner he joins with the survivors in carrying on the business. *Service v. McDonnell.* 260

2. An undertaking on his part, alone or in connection with others, that the new firm will pay the debts of the old firm, can be enforced only by the old firm; its creditors may not sue for a breach of it. *Id.*

3. A creditor who, in executing a composition agreement, has been guilty of fraud in respect to the other compounding creditors, by secretly stipulating for a preference to himself, may not avoid the agreement, because of a similar fraud practiced upon him. *White v. Kuntz.* 518

4. The composition agreement is only void as to the innocent creditors executing it. *Id.*

5. *It seems* an innocent creditor, upon repudiating the composition agreement, is restored to the right to enforce his original claim. *Id.*

6. Any contract or promise, whereby one of the compounding creditors secretly secures to himself an advantage over the others, and any security given upon any such contract or promise, is void. *Id.*

7. *It seems* that any security taken by one of the compounding creditors, even for the sum payable to him under the composition agreement, aside from that which is common to all, if unknown at the time to the other creditors, is inoperative and void. *Id.*

DEED

1. N. was the owner of certain lands containing deposits of building sand and the sale of the sand constituted his only business. S. offered to purchase a small parcel of the

land, but N. declined to sell on the ground that it would interfere with his business. S. agreed to purchase, covenanting not to sell any sand off from the parcel. N. thereupon sold and conveyed, his deed containing such a covenant on the part of the grantee. S. subsequently conveyed by warranty deed, to defendant, without covenants on the part of the latter, who, however, had notice before taking his deed of the covenant in the deed to his grantor. Defendant opened a pit on his land, sold sand therefrom and declared that he should continue to sell notwithstanding such covenant. (*Held, ANDREWS and EARL, JJ., dissenting*), that an action was maintainable to restrain such sale. *Hodge v. Sloan.* 244

2. A. owned a lot of land, upon which was a spring of water; he gave to B., the owner of an adjoining lot, in consideration of a small annual rent, a parol license, revocable at his pleasure, to lay a pipe underground from the spring to conduct the water therefrom to the house of the latter. B. laid the pipe to his house, where it discharged into an open tub. C. owned a lot, separated about fourteen rods from that of A., the lot of B. intervening. With the consent of A. and B., C. laid a pipe from his house to the tub on the premises of B. and thus took the surplus water therefrom for the use of his house. A. thereafter purchased C.'s lot, and his tenant, by his direction, connected the two pipes at the tub, which was thereafter supplied by a branch pipe. A. sold and conveyed the C. lot "with the appurtenances thereto belonging;" the deed making no mention of the spring or of the water therefrom. Through various mesne conveyances, containing similar descriptions, plaintiff acquired title to said lot. A. continued to own the lot upon which was the spring until his death; his executors thereafter sold and conveyed the same to defendant by deed, describing it by metes and bounds, and containing no reservation or mention of any right in any other person to the spring or

the water from the spring. Defendant, after the conveyance to her, disconnected the pipe from the spring. In an action to restrain such interference with the flow of water through the pipe and to enforce plaintiff's alleged right to a supply of water from the spring, it appeared that, when defendant was negotiating for the purchase, R., who then owned plaintiff's lot, informed defendant that no person, other than the executors, owned any right in or to the waters of the spring or to take water therefrom, and she relied on such statement in making the purchase. The trial court found that the water from the spring was necessary for the use and enjoyment of plaintiff's premises, and with it they were of much more value than without, but that the premises could have been supplied with water by means of a well on the premises; defendant offered to show on the trial that such a well could have been dug at a small cost. *Held*, that the action was not maintainable; that the right to the use of the water did not pass as an appurtenance under the deed from A. of the plaintiff's lot; and that there was no implied easement giving such a right. *Root v. Wadhams.* 384

DEFENSES.

1. A defense to the foreclosure of a purchase-money real estate mortgage on the part of the mortgagor, alleged to have existed at the time of its inception, can only arise where fraud has been practiced by the mortgagee in procuring its execution, or there is a failure of consideration. *McConihe v. Fules.* 404
2. Where, therefore the purchaser is in the undisturbed possession of the land he cannot, in the absence of fraud, resist the foreclosure of such a mortgage on the ground simply of defect of title. *Id.*
3. The defense of want of consideration is available against an assignee of a mortgage, although he is a *bona fide* purchaser; he stands in respect to the security in the place

of the assignor. *Briggs v. Langford*. 680

— *Where the county treasurer was authorized to borrow money and issue its obligation therefor, in an action against a county on notes for money loaned purporting to have been given pursuant to such authority, held, the presumption, in the absence of proof to the contrary, was that the money was borrowed as authorized and applied to the uses of the county, and the fact that the county treasurer had fraudulently overissued notes to a large amount, was no defense; also, the fact that plaintiff was a member of the board of supervisors did not charge them with notice of the wrongs perpetrated by the county treasurer.*

See Clark v. Bd. of Supervisors. 558

DEFINITIONS.

1. By the word "appurtenance" nothing passes except such incorporeal easements, rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted; a mere convenience is not sufficient to create such a right or easement. *Root v. Wadhams*. 384
2. A water-course, as defined in the law, means a living stream with defined banks and channel, not necessarily running all of the time, but fed from other and more permanent sources than mere surface water. *Jeffers v. Jeffers*. 650

DELIVERY.

Unless otherwise expressed in the contract, the vendor, on a sale of chattels, is bound to deliver them to the purchaser where they are at the time of sale, on performance by the latter of the terms of sale. *Gray v. Walton*. 254

DURESS.

In an action brought to procure the cancellation and discharge of a mortgage, on the ground that it

had been procured by duress, the trial court found that the execution of the mortgage was procured by defendants by threats and menaces, to the effect that unless the mortgagor gave it they would cause her son to be sent to state prison for larceny and embezzlement, for which he was under arrest and indictment on their complaint, they stating if their terms were complied with they would release the prisoner, if in their power, but if not complied with he would be sent to state prison; that she executed the mortgage while under fear, terror, coercion and duress created by the threats, and that the prisoner was immediately thereafter discharged on his own recognizance. *Held*, that the findings were sufficient to sustain a judgment for the relief sought. *Schooner v. Lissauer*. 111

EASEMENTS.

A. owned a lot of land, upon which was a spring of water; he gave to B., the owner of an adjoining lot, in consideration of a small annual rent, a parol license, revocable at his pleasure, to lay a pipe underground from the spring to conduct the water therefrom to the house of the latter. B. laid the pipe to his house where it discharged into an open tub. C. owned a lot, separated about fourteen rods from that of A., the lot of B. intervening. With the consent of A. and B., C. laid a pipe from his house to the tub on the premises of B. and thus took the surplus water therefrom for the use of his house. A. thereafter purchased C.'s lot, and his tenant, by his direction, connected the two pipes at the tub, which was thereafter supplied by a branch pipe. A. sold and conveyed the C. lot "with the appurtenances thereto belonging;" the deed making no mention of the spring or of the water therefrom. Through various means conveyances, containing similar descriptions, plaintiff acquired title to said lot. A. continued to own the lot upon which was the spring until his death; his executors thereafter

sold and conveyed the same to defendant by deed, describing it by metes and bounds, and containing no reservation or mention of any right in any other person to the spring or the water from the spring. Defendant, after the conveyance to her, disconnected the pipe from the spring. In an action to restrain such interference with the flow of water through the pipe and to enforce plaintiff's alleged right to a supply of water from the spring, it appeared that, when defendant was negotiating for the purchase, R., who then owned plaintiff's lot, informed defendant that no person, other than the executors, owned any right in or to the waters of the spring or to take water therefrom, and she relied on such statement in making the purchase. The trial court found that the water from the spring was necessary for the use and enjoyment of plaintiff's premises, and with it they were of much more value than without, but that the premises could have been supplied with water by means of a well on the premises; defendant offered to show on the trial that such a well could have been dug at a small cost. *Held*, that the action was not maintainable; that the right to the use of the water did not pass as an appurtenance under the deed from A. of the plaintiff's lot; and that there was no implied easement giving such a right. *Root v. Wadhams*. 884

ELECTION (OF OFFICERS).

1. The Soldiers' Home, incorporated under the act of 1876 (Chap. 270, Laws of 1876), is an "asylum," and its inmates are supported at public expense, within the purview of the provision of the state Constitution (art. 2 § 8), declaring that "for the purpose of voting no person shall be deemed to have gained or lost a residence * * * while kept at any alms-house or other asylum at public expense." *Silvey v. Lindsay*. 55
2. The fact of the presence in that institution of an inmate, therefore, does not constitute a test of his right to vote, and is not to be considered in determining that question; he must find the requisite qualifications elsewhere. *Id.*
3. Plaintiff offered to vote at the annual town meeting for the year 1886 in the town of B., wherein said institution is located. On being challenged, plaintiff stated in substance, that he resided in the town of B., for the reason that he was admitted an inmate of said Home in 1880 and had remained an inmate since that time, with the intention at all times of making his residence in said institution so long as he should be permitted to remain; that at the time of such admission he was an honorably discharged soldier and a resident and voter in the city of New York; that, therefore, he was a resident of the town, and that in becoming an inmate he intended to change his residence from said city to said town. *Held*, that plaintiff was not entitled to vote; that his narration of an intention to change his residence and his assertion that he was a resident of the town could be accepted only as his conclusions from the circumstances detailed; that the town officers presiding at such election were not bound by them, but by the facts, and so were justified in rejecting the vote. *Id.*
4. It seems that one duly qualified to vote, as provided by the Constitution (art. 2, § 1), cannot be deprived of that right by any inferior tribunal; the officers presiding at an election determine the question at their peril, and are liable to him in damages, in case of an erroneous determination that he is disqualified, and a rejection of his vote. *Id.*
5. The relators, claiming to represent the United Labor Party of the city of New York, which party they allege polled more than fifty thousand votes at "the next preceding election," on proof that the board of police had refused to appoint inspectors of election of the political faith and opinion of that party as required by the amendment of 1887 (Chap. 490, Laws of 1887), of the consolidation act, applied for a

peremptory writ of *mandamus* to compel such appointment which was denied. The record on appeal to this court showed that two other organizations claimed to be the sole and proper representatives of the voters who deposited the votes in question and that they were entitled to the additional inspectors. *Held*, that the writ was properly denied; that in the exercise of a legal and proper discretion, upon being satisfied from the record that there was an honest dispute as to material facts which should be determined, the court was justified in refusing a peremptory writ, although the issues were in a strict and technical construction of the papers inartificially or loosely made up. *People ex rel. v. Board Police.* 235

6. An alternative writ was granted, to which two of the four members of the board made a return, the other two refusing to join therein. *Held*, that the return was properly received and entertained; that the court would not be driven into issuing a peremptory writ to guide the conduct of public officers charged with a public duty upon any narrow construction of a return to its alternative writ, where from all the papers it is seen that there is a substantial and material issue of fact. *Id.*

ELECTRICAL COMPANIES.

1. The act of 1885 (Chap. 499, Laws of 1885), entitled "an act providing for placing electrical conductors under ground in cities of this state, and for commissioners of electrical subways" is not violative of the provision of the state Constitution (Art. 3, § 16), declaring that no local or private bill shall embrace more than one subject, and that shall be expressed in the title. Said act is not a local or private bill within the meaning of the constitutional provision, and embraces but one subject, which is fairly expressed in the title. *People ex rel. v. Squire.* 593
2. The fact that said act (§ 2) charges the board of commission
- ers of electrical subways, thereby directed to be appointed, with the duty of enforcing the provisions of the act of 1884 (Chap. 534, Laws of 1884), and declares that the said act of 1884 is thereby amended so as to conform to the provisions of the act of 1885, does not render the latter act obnoxious to the constitutional provision (Art. 3, § 17), declaring that no act shall be passed providing that any existing law shall be deemed part thereof or applicable thereto, "except by inserting it in said act." *Id.*
3. The fact that said act of 1885 directs that the costs and expenses of each board of commissioners appointed under it shall be assessed upon the companies "operating electrical conductors in the city," does not render the act void as imposing a tax upon the companies specified without consent, hearing or benefit, in violation of the Constitution. (Art. 1, § 5.) No tax is imposed within the meaning of the Constitution. *Id.*
4. *It seems* that, conceding said provision in relation to assessments does impose a tax, it does not necessarily invalidate the other provisions of the statute. *Id.*
5. The said act of 1885, so far as it affects corporations organized before its passage, is not obnoxious to the constitutional prohibition against laws impairing the obligations of contracts; it does not annul, destroy, or materially impair or restrict any franchises or contract rights previously secured, but seeks to regulate and control their exercise, so that they shall cease to constitute a public nuisance. *Id.*
6. The relator was incorporated under the general act of 1848 (Chap. 265, Laws of 1848), for the purpose of constructing and maintaining electric conductors to be placed under the streets in the city of New York. It received from the common council of the said city by virtue of the power conferred on that body by the act of 1879 (Chap. 397, Laws of 1879), permission to construct conduits and lay wires in certain streets, the work

to be done under the supervision of the commissioner of public works. In 1888 the relator filed with the county clerk certain maps, etc., as required by the ordinance, and in 1886 made application to the department of public works for permission to make excavations in certain streets in order to lay its wires and conductors, which was refused on the ground that the relator had not obtained the approval of the subway commissioners appointed pursuant to said act of 1885, as required by said act. In proceedings to obtain a peremptory *mandamus* requiring said commissioners to grant the permit, *held*, that the application for the writ was properly denied. *Id.*

EQUITY.

Where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant and the original defendant has been discharged, on payment into court of the amount of the demand, in pursuance of the provision of the Code of Civil Procedure (§ 820), the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a trial by jury. *Clark v. Mosher.* 118

— When equitable action maintainable to charge a party as trustee *ex malificio*.

See *Piper v. Hoard.* 78

— Ante-nuptial contract enforceable in equity without reference to the validity of the agreement at law.

Johnston v. Spicer. 185

See SPECIFIC PERFORMANCE.

EQUITABLE CONVERSION.

S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the

use of the testator's wife during her life; after her death the rents and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint." The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted "from the sum bequeathed to such daughter in this section." The will also empowered the executors "for the purpose of carrying into effect" the will and the trusts therein created, to sell "in their discretion" any and all of the real estate. In an action for partition of certain real estate of an interest in which the testator died, seized, and which was included in said residuary clause, *held*, that an infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (§ 1538); that she never could take the real estate, and had no title thereto or interest therein as realty, but that the whole title vested in the executors and trustees; that, construing all the provisions of the will together, the direction to sell the real estate was imperative and there was, therefore, an equitable conversion thereof into personalty. *DeLafield v. Barlow.* 535

ESCHEAT.

1. All rights of property, of whatever nature, revert to the People when the owner dies intestate and there is a failure of heirs to take such property. In respect to the rights so acquired by the State there is no essential difference between real and personal property, although the doctrine of escheat applies only to legal estates and

does not, in a strict sense, affect either equitable estates or personal property. *Johnston v. Spicer*. 185

2. The history of legislation in this State upon the subject of escheat and the administration of the estates of persons dying intestate without heirs, given. *Id.*
- 3 By an ante-nuptial agreement between G. (the man) and E. (the woman) G. covenanted and agreed that, in case of his death without leaving lawful issue by the contemplated marriage, previous to the death of E., all of the real and personal property, of which he should die possessed, should belong to her. The parties intermarried, but had no children, and G. died intestate seized of certain real estate, upon which was a mortgage. E. died thereafter intestate, leaving no lawful heir. In a controversy as to the right to the surplus money arising on foreclosure sale. *Held*, that upon the death of G. the legal title to the real estate went to his heirs; but that by force of the marriage settlement, E. became the equitable owner, and a trust by implication arose in her favor; the heirs holding the title as a naked trust for her and subject to her right to be vested with it on demand; and that upon her death without heirs her interest and rights reverted to the state, and it was equitably entitled to the surplus. *Id.*

ESTOPPEL.

1. Where a judgment by default was rendered, adjudging a marriage null and void, and a motion to open the default was denied, *held*, that defendant was not precluded by the judgment and order denying the motion from maintaining an action to set aside the judgment on the ground of fraud. *Blank v. Blank*. 91
2. In an action upon a policy of life insurance the defense was a breach of warranty. The alleged breach was that an answer in the application to a question as to the age of the insured, was untrue. It ap-

peared that the answer was written in by a general agent of the defendant; that the insured was a German, understanding the English language very imperfectly; that when asked his age he answered that he did not know, and when assured that it was necessary to be known he repeated his former statement; that the agent made some computation or estimate and entered his conclusion in the application, and that this was not read over to the insured after the answers were written in. No fraud was alleged or found. *Held*, that an estoppel *in pais* was fairly established which precluded defendant from setting up the falsity of the answer in avoidance of the policy. *Miller v. Phenix Mut. L. Ins. Co.* 292

3. To constitute an equitable estoppel there must have been some act or admission by the party sought to be estopped, inconsistent with a claim he now makes, and done or made with the intention of influencing the conduct of another, which he had reason to believe would, and which did in fact have that effect. Silence will not estop unless there is not only a right, but a duty to speak. *N. Y. Rubber Co. v. Rothery*. 310
4. Where, therefore, a riparian owner saw the owner on the opposite side of the stream erecting a factory upon his premises and digging a race which she knew would return the water, diverted from the stream, to it at a point below her land, *held*, that her omission to object in any way to the proposed diversion of the water, did not constitute an estoppel barring an action to recover for such diversion. *Id.*
5. *It seems* that courts are quite disinclined, by the application of the rules relating to estoppel *in pais*, to give to mere licenses, based upon no consideration, the force and effect of absolute agreements, and the case must be quite peculiar and exceptional which will authorize a licensee to proceed under his license after its revocation. *Fargis v. Walton*. 396

6. A purchaser of the mortgaged premises, who takes a deed subject to the mortgage, is estopped from contesting the consideration or validity of the mortgage; and, so long as he remains in possession of the premises, cannot defend against the mortgage because of failure of title. *McConihe v. Fales*. 404

— *When acceptance of new lease not a waiver or estoppel from claiming breach of covenant in old lease.*

See McGregor v. Board of Education. 511

— *When judgment in partition suit conclusive on parties, although there is a defect in parties plaintiff.*

See Reed v. Reed. 545

EVIDENCE.

1. Upon the trial of an indictment for larceny, in obtaining money by means of a draft drawn by defendant, as agent of an insurance company, upon the general agent of the company, McD., the general agent upon whom the draft was drawn, was called as a witness by the People. On cross-examination he was questioned as to a civil action commenced by the insurance company against defendant, in which he had verified the complaint. He was asked what he swore to as to a particular matter, and gave answers showing that the complaint contained an allegation somewhat at variance with his testimony on direct-examination. After a redirect-examination the district attorney offered in evidence a copy of the complaint. The court received it in evidence for the purpose of showing what the witness had sworn to, stating that it could not "be evidence upon any other point." The complaint contained thirteen counts, only one of which related to the matter inquired of on cross-examination. *Held*, that the ruling was not error; that, while the whole complaint was not competent, the district attorney had the right to prove the whole, and to read so much of it as related to the cross-

examination, and which tended to explain or qualify the testimony so elicited; and that a fair construction of the ruling of the trial judge was that he received the complaint only for the purpose of showing what McD. had testified as to the matter inquired of upon the cross-examination. *People v. Dimick*. 13

2. The evidence showed that defendant's firm had the agency in Buffalo for four insurance companies, one of them the C. Ins. Co.; that he insured the cargo in question in that company, but after he was advised of the loss changed it to one of the other companies. The People were allowed to give evidence, under objection and exception, that defendant had during the same season in several instances after knowledge of a loss, insured against in the C. Co., changed the insurance to one of the other companies for the purpose of shielding the C. Co. *Held*, no error; that the evidence was proper on the question of motive and intent; also that, although the proof as to the other crimes was inconclusive, the People had the right to give it and have it submitted to the jury with proper instructions. *Id.*

3. This action was brought by a purchaser of real estate to recover back the portion of the purchase-price paid by him on execution of the contract of sale on the ground that defendant inherited the property from C., who died within three years intestate, that the administration of his estate had not been closed and plaintiff would have to take the property, subject to the debts of the intestate, if any there should be after his personal estate was exhausted, also to the possibility of the discovery of a will within four years after the death which would govern the disposition and render a conveyance void. The court excluded evidence on the trial offered by plaintiff, that he was unable to procure a loan on the property and that lawyers, familiar with such questions, regarded a title derived from an heir within the periods named in the complaint, not mar-

ketable. *Held*, no error; that the question as to the sufficiency of the title was for the court, and the opinion of conveyancers was immaterial. *Moser v. Cochrane*. 85

4. A local history is not competent evidence upon the question as to the date when possession and occupancy of land by a private individual began. *Roe v. Strong*. 350

5. On the trial of an indictment for murder, wherein it was claimed by the prosecution that the deceased was shot by defendant, on the cross-examination of one McM. the defendant was permitted to prove that immediately after the shooting the injured person stated in the presence of McM. and others, that McM. had shot her. *Held*, it was competent for the prosecution to prove that McM., at the time, denied the charge, produced his pistol, and delivered it to an officer present; also that the pistol was fully loaded, and its barrel cold. *People v. Driscoll*. 414

6. An indictment for bribery, under the Penal Code (§ 78), charged the defendant with offering and giving to F., a member of the common council of the city of New York, a specified sum of money, with intent to influence him in the exercise of his powers and functions as such member, upon the application of the Broadway Surface Railroad Company for the consent of the common council to the construction of its railway. On the trial it was proved that a bribe had been given to and accepted by F.; also, that defendant was suborned as a witness and attended in obedience to the subpoena before a committee of the state senate appointed to investigate the methods adopted by the company in obtaining such consent. The preamble and resolutions appointing the investigating committee were given in evidence. The former referred to the provisions of the Constitution and the statutes relating to street railways requiring the consent of the local authorities and recited that the charge was made that the consent to the rail-

road upon Broadway was obtained by fraud and through corrupt influence and bribery of members of the common council, and the committee was authorized by the resolutions to investigate fully the action of the board of aldermen of said city which granted or gave the consent, "or of any member thereof who voted for the same in respect thereto." The sergeant-at-arms of the senate was directed to attend the sitting of the committee, serve subpoenas, etc. The prosecution was then allowed to prove, under exception and objection, the testimony so given by defendant, which tended to show his complicity in the crime. *Held*, error; that the senate had power to authorize the investigation; that the testimony was to be considered as given under compulsion; that the case was covered by said section; and, therefore, that the testimony so given was privileged. *People v. Sharp*. 427

7. Evidence was allowed to be given on the part of the prosecution, under objection and exception, proving a corrupt proposal made, about a year prior to the offense charged, by defendant to an engrossing clerk of the assembly, to pay said clerk \$5,000 to alter a certain bill in reference to street railways, which said clerk then had in his possession, so that its terms might authorize the construction of a railroad on Broadway in said city. *Held*, error. *Id.*

8. One M., a member of the board of aldermen, called as a witness for the prosecution, testified that after the "consent" was given he received from one De L. \$5,000. After repeatedly denying any understanding on his part that it was paid on account of the Broadway Railroad Company, he was asked: "What did you think at the time, what he gave it to you for?" The witness answered, under objection and exception: "I supposed it was for the Broadway road." *Held*, the testimony was incompetent and its reception error. *Id.*

9. The prosecution was permitted to prove, as part of the evidence in

chief, by a detective officer that he had been employed by the district attorney to serve subpoenas upon certain persons named in the indictment as co-defendants, who were claimed by the prosecution to be important and material witnesses, and some of whom, especially one M., it had already been proved were intermediaries between the person giving and those receiving the bribes; that he found M. in Canada and served a subpoena upon him; that the others were in Canada also, but that witness did not see them. It was not claimed by the prosecution that defendant was privy to their absence, or that the object of the testimony was to furnish a basis for evidence otherwise inadmissible. *Held*, that the reception of the evidence was error. *Id.*

10. When oral evidence proper to aid in interpretation of a writing, claimed to be an acknowledgment of a debt within the statute of limitations. *Manchester v. Braedner*, 346

EXCEPTIONS.

Under the new practice introduced by the provision of the Code of Civil Procedure (§ 992), forbidding exceptions to findings of fact in actions tried by the court or a referee, and permitting questions of fact to be reviewed by the General Term without exceptions, it is the duty of an appellant desiring a review of questions of fact to see that the case contains a certificate that all the evidence has been included, or all bearing on the questions so sought to be reviewed; in the absence of the certificate the General Term has a right to refuse to review such questions. *Porter v. Smith*, 531

EXECUTION.

1. A judgment recovered against the trustees of a school district, upon a contract entered into by them on behalf of the district, binds them

individually, and may be collected by execution out of their individual property. (Code Civ. Pro. §§ 1927, 1929, 1931; Laws of 1864, Chap. 555, tit. 13, §§ 6-11.) *People ex rel. v. Abbott*, 225

2. A transcript of a Justice's Court judgment for \$310.69 was filed in the county clerk's office. After the expiration of five years a motion was made by plaintiff in the County Court for leave to issue execution. On the hearing of the motion defendant did not appear, but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment, under and by virtue of an assignment executed by plaintiff's general agent. The matter was referred to a referee, who reported that plaintiff made an agreement in writing to sell the judgment, and that there was no fraud inducing it. The court, on hearing counsel for plaintiff and the contestant, the defendant not appearing, confirmed the report, denied plaintiff's motion, with costs to the contestant. *Held*, that it was a special proceeding within the meaning of the Code of Civil Procedure (§ 1857), and that the order was appealable to the Supreme Court. *Ithaca Ag. Wks. v. Eggleston*, 373

EXECUTORS AND ADMINISTRATORS.

1. W. recovered a verdict against K. in May, 1868; K. died intestate in January, 1868; his administrator qualified in February, 1868; W. presented his claim in March, 1864. In February, 1864, a petition was presented by other judgment creditors asking that the administrator of K. be required to pay their judgment. The administrator by his answer thereto, verified and filed in March, 1864, set up the judgment recovered by W.; that it was entitled to a priority; that notice of the claim thereon had been presented and that the assets were insufficient to pay it. *Held*, that conceding the eighteen months exclusion applied, this answer was not a sufficient acknowledgment to

- revive the W. judgment, as he was not a party to the proceeding in which the answer was interposed. *In re Kendrick.* 104
- 2 A petition by the administrator for a judicial settlement of his accounts was verified November 20th and filed November 28, 1884. Among the names set forth therein of those interested in the estate as creditors, etc., was that of W. The petition did not specify the amount or date of judgment or that any amount was due thereon. The administrator's account, which was verified at the same time with the petition, set forth said judgment and stated that the claim thereon was disputed by the administrator. *Held*, that the statement in the petition did not amount to a written acknowledgment of the debt. *Id.*
3. On the hearing before the surrogate in January, 1885, an order was made on motion of the administrator allowing the account to be amended, by striking out the statement that the W. judgment was a disputed claim. Previous to this another judgment-creditor had filed objections to the claim on the W. judgment, on the ground that it was barred by the statute. *Held*, that it was out of the power of the administrator at that stage to bind the contesting creditors by any acknowledgment of the W. judgment as a subsisting claim. *Id.*
4. Upon the settlement of an administrator's accounts creditors, whose claims are not barred by the statute of limitations, are entitled to object to those which are, when the assets are insufficient to pay both. *Id.*
- 5 A citation was issued by the surrogate of the county of New York to the widow and next of kin of an intestate, notifying them of an intended application by the public administrator for letters of administration. Upon the day and hour named in the citation, the counsel for the widow and next of kin appeared before the surrogate to oppose; but there was no appearance on the part of the public administrator. Said counsel re-
- mained in court until after the second call of the calendar and was then informed by the surrogate that there was no such application on the calendar. No application was made on that day, but subsequently, and without notice to said counsel and in his absence, the application was made and granted. *Held*, that the order was void; that no order having been made on the return day of the citation, either adjourning the hearing or determining the matter, the surrogate lost jurisdiction to proceed further, without either due service of another citation or a voluntary appearance of the widow and next of kin. *In re Page.* 266
6. A motion to revoke the letters was denied by the surrogate and his order was affirmed by the General Term. *Held*, that as the decisions below showed a fair justification for the conduct of the public administrator, and as his good faith was not questioned, the taxable costs of the proceedings should be paid out of the estate. *Id.*
7. *It seems* that under the provision of the New York Consolidation Act (§§ 219, 220, Chap. 410, Laws of 1883), the public administrator has no right of administration upon the estate of one dying intestate, without the state, leaving effects within the county of New York, who was not a citizen of the state. *Id.*
8. Under the provisions of the Revised Statutes, however (§ R. S. 74, § 27), which in this respect have not been repealed by the Code of Civil Procedure, the public administrator has a right of administration, contingent upon the refusal of others who have a prior right. *Id.*
9. The widow and next of kin of a citizen of the United States, but a non-resident of this state, dying intestate out of the state, leaving personal property in said county, are entitled to letters of administration in the order of priority named in the statute. *Id.*
10. It is not necessary, however, that

they should initiate the proceedings; the public administrator may, and, in case of their neglect, it is his duty to do this, and if after proper service of a citation, upon hearing on his application, it appears there is a widow or relative competent, qualified and willing to take, letters must be issued to such person; if this does not appear the public administrator is entitled to administration, at least where there are creditors of the decedent in said county. *Id.*

FACTORS.

1. *M. D. & Co.*, shipped certain sugars at Manila for New York, taking bills of lading therefor, transferable to their order on payment of the freight; these bills said firm indorsed in blank and delivered to defendant to secure the acceptance and payment of bills of exchange drawn by the consignors and discounted by defendant. The bills were accepted, and at the request of the drawees, defendant, through its New York agent, delivered the bills of lading to plaintiff, receiving his receipt therefor, which contained an agreement on his part to store the sugars as defendant's property as soon as landed in a public warehouse, delivering warehouse receipts to be retained by defendant's agent until the acceptances were paid or provided for. The intention of the arrangement, it was stated, was "to protect and preserve unimpaired the lien of the bank or its agent on said merchandise." Plaintiff was a commission merchant in New York and had acted as such for *M. D. & Co.*, in the sale of goods sent by that firm to New York for sale. His practice had been to advance moneys to pay the freight on goods sent by said firm to New York, when received, to sell the same, reimburse himself for the advances and account for the net proceeds. To obtain possession of the sugars on arrival, plaintiff was required to and did pay the freight; he caused them to be entered in the custom house and placed in a public warehouse, taking warehouse

receipts in his own name. *Held*, that plaintiff was entitled to have the sum so paid refunded before defendant was entitled to the property; that the latter, whether regarded as pledgee or owner, had the right of possession only on payment of the freight; that plaintiff stood in no position toward *M. D. & Co.*, which made it his duty to advance the money out of his own funds and trust to the personal credit of that firm for repayment; that the receipt required plaintiff to receive the property from the carrier on arrival and store it as the defendant's property, and when defendant thus permitted plaintiff to take the property it became obligated to repay the expenses actually and necessarily incurred by the latter in the performance of his agreement; that the agreement was fully carried out when the lien of the bank was kept exactly in the same state it was in when the arrangement was made. *Cooper v. H. K. & S. Bkg Corp.* 282

2. *It seems* there is no unvarying rule of law making it the duty of a commission merchant to advance from his own pocket moneys due for freight on property consigned to him by his principals. *Id.*

FINDINGS OF LAW AND FACT.

The refusal of a trial judge to find on questions of fact is not fatal to his judgment where the findings asked were not material to the decision of the case, or would not be beneficial to the party asking them. *Callanan v. Gilman.* 860

FORECLOSURE.

1. *It seems* it is competent for the court in the judgment in a foreclosure action to direct the land to be sold free of all liens, taxes and assessments or subject thereto, or it may require them to be paid out of the proceeds of sale under such terms and conditions as it shall prescribe. *Day v. Town of New Lots.* 148
2. A defense to the foreclosure of a

purchase-money real estate mortgage on the part of the mortgagor, alleged to have existed at the time of its inception, can only arise where fraud has been practiced by the mortgagee in procuring its execution, or there is a failure of consideration. *McConihe v. Pales*.

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3. Where, therefore, the purchaser is in the undisturbed possession of the land he cannot, in the absence of fraud, resist the foreclosure of such a mortgage on the ground simply of defect of title. *Id.*

4. A purchaser of the mortgaged premises, who takes a deed subject to the mortgage, is estopped from contesting the consideration or validity of the mortgage; and, so long as he remains in possession of the premises, cannot defend against the mortgage because of failure of title. *Id.*

5. The members of the firm of McD., K. & Co., purchased, for the purposes of the firm business, certain real estate which was conveyed to the individual members and thereafter used by the firm. McD. died intestate, and his interest in the real estate was sold by order of the surrogate to pay his individual debts, the purchaser conveyed said interest to E. who sold and conveyed the same to C., taking the bond of the latter, secured by mortgage on the interest purchased to secure a portion of the purchase-money. E. also caused to be conveyed to C. a third interest in the firm business, the latter covenanting to pay all the existing debts of the firm. C., with the surviving partners, formed a co-partnership to carry on the business, and used and occupied the said real estate. The new firm having become insolvent, made a general assignment for the benefit of creditors, which included the said real estate. The assignees sold and conveyed the same to F., subject to all liens and incumbrances. F. took and retained possession. In an action to foreclose the mortgage so given by C. it did not appear that there were any debts of the old firm out-

standing or existing at the time of the conveyance to him. *Held*, that neither C. nor F. or his grantees had any legal or equitable defense to the mortgage; that E. at the time of his conveyance to C. had an interest in the property capable of being transferred by deed, which furnished a sufficient consideration for the bond and mortgage, and that the same was a valid and subsisting lien at the time of the conveyance to F.; that no equities existed in favor of creditors giving the assignees power to question the lien of the mortgage; but even if there were, as they did not, and did not transfer any right to do so, but sold subject to existing liens, their grantee and those succeeding to his interests acquired no such right. *Id.*

See MORTGAGE.

FOREIGN LAW.

— *Where order appointing receiver under New Jersey statute providing for appointment of receiver, "when any corporation shall be dissolved" was proved, held, that in absence of proof that the order was an interlocutory one, or of some other law under which receiver might be appointed, which was consistent with life of corporation, action was not maintainable in name of corporation.*

See M. T. & I. Co. v. Clair. (Mem.) 663

See CONFLICT OF LAWS.

FORMER ADJUDICATION.

1. Where a judgment by default was rendered, adjudging a marriage null and void, and a motion to open the default was denied, *held*, that defendant was not precluded by the judgment and order denying the motion from maintaining an action to set aside the judgment on the ground of fraud. *Blank v. Blank.* 91
2. The will of L. gave a life estate in two-twentieths of his property to his widow, the remainder over to

his infant daughter M., in case she survived her mother; if not, then to certain other beneficiaries in the order named. In an action for partition of certain real estate of which said testator died seized, commenced during the minority of A., and wherein she was made a party defendant, the judgment directed a sale of the premises. The testator's widow was given the liberty to accept, and did accept, out of the proceeds of sale, a gross sum in lieu of her interest as tenant for life, and the balance of the purchase-money of the twentieths was directed to be paid into court, to be invested by the chamberlain of the city of New York, and, upon the death of the life tenant, the fund, "with all accumulations of interest, dividends or income," to be paid to M., if then living; if not, then to the beneficiaries entitled under the will to take. Upon coming of age M. petitioned that the accumulation be paid over to her on the ground that such accumulation was prohibited by statute (1 R. S. 726, §§ 87, 88), and that she was entitled thereto "as presumptive owner of the next eventual estate." *Held*, that the matter of the disposition of the fund was directly involved in the action and was *res adjudicata*; and, therefore, that the petition was properly denied. *Livingston v. Tucker.* 549

FRAUD.

1. If, at the time of the discovery of a fraud, the party injured has a legal capacity to act and to contract, his right of action accrues and the statute of limitations begins to run against it, irrespective of the degree of intelligence possessed by him, or of his freedom from undue influence, or his ability to resist it. *Piper v. Hoard.* 67
2. The fact, therefore, that the person injured was, after a discovery of fraud, induced by other fraudulent representations, or by undue influence, to refrain from prosecuting until the time limited by the statute has expired, is no answer to a plea of the statute. It must be made to appear that at the time of the discovery he had not the legal capacity to act. *Id.*
3. Accordingly *held*, where the owner of real estate was induced to convey the same by fraudulent representations and undue influence on the part of the grantee, and after discovery of the fraud commenced an action against the grantee to set aside the conveyance because thereof, but was induced by further fraudulent representations and undue influence to discontinue the same, that another action to set aside said conveyance, commenced more than ten years after the discovery of the original fraud, was barred by the statute. *Id.*
4. Plaintiff's complaint alleged in substance, that A. died seized of certain real estate which he devised to his two sons, J. and F., subject to the limitation as to F., that if he should die without issue his share should go to J. and his heirs; that F. conveyed his interest to defendant, who subsequently induced C., plaintiff's mother, to marry F. by means of the false and fraudulent representations that F. had a fine property so left to him that if he married and had an heir the land would go to the heir. The complaint further alleged that plaintiff was the only child of such marriage; that the real estate was partitioned between J. and defendant as the grantee of F., and defendant since then has occupied and still occupies and claims to own the part set off to him. The relief asked was that plaintiff be declared the owner of the portion so set off to defendant and be placed in possession thereof. On demurrer to the complaint *held*, that it set forth a good equitable cause of action and the demurrer was properly overruled; that defendant was bound by his representations and must be considered as holding the property as trustee *ex maleficio*; and so, should be held to make good the thing to plaintiff, who would have had the property had the representations been true; that it was immaterial

that plaintiff was not living at the time the representations were made, as they were made in her favor and enure to her benefit; and that the question was not affected by the fact that plaintiff's mother was induced to agree to the marriage by purely mercenary considerations. *Piper v. Hoard*. 73

5. The law of marriage as administered by courts, so far as property interests are concerned is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance. *Id.*

6. Where a judgment by default was rendered, adjudging a marriage null and void, and a motion to open the default was denied, *held*, that defendant was not precluded by the judgment and order denying the motion from maintaining an action to set aside the judgment on the ground of fraud. *Blank v. Blank*. 91

7. In such an action the fraud alleged was that plaintiff was induced by false representations on the part of defendant, who was a lawyer, to the effect that the marriage was void under the laws of New York, to refrain from consulting counsel and defending the action to annul the marriage. The complaint in that action set forth facts sufficient to justify the court in annulling the marriage on the ground of fraud practiced by the defendant therein. Neither in the complaint in the action to set aside the judgment, nor by any proof or offer of evidence on the trial did the plaintiff attempt to controvert such facts, to deny that she was guilty of the fraud charged, or to show that she had any defense upon the facts in the former action. *Held*, that without regard to the question as to whether the marriage was lawful or unlawful as matter of law, or as to whether the representations of defendant in regard thereto were truthful or not, the complaint was properly dismissed, as it did not appear even if he was wrong in his statement

of the case that plaintiff was thereby deprived of any defense in the former action. *Id.*

8. A creditor, who, in executing a composition agreement, has been guilty of fraud in respect to the other compounding creditors, by secretly stipulating for a preference to himself, may not avoid the agreement, because of a similar fraud practiced upon him. *White v. Kuntz*. 518

9. The composition agreement is only void as to the innocent creditors executing it. *Id.*

10. *It seems* an innocent creditor upon repudiating the composition agreement, is restored to the right to enforce his original claim. *Id.*

FRAUDS (STATUTE OF).

See STATUTE OF FRAUDS.

GENERAL TERM.

See APPEAL.

GUARANTY.

In February, 1879, defendant wrote a letter to plaintiffs requesting them to send to P. a full line of samples "suitable for spring and summer at the lowest figure," adding "I will guarantee the payment of any goods you may sell him, hoping you will comply with my request and attend to it at once." Plaintiff sent the samples as requested; P. ordered various bills of goods from time to time and paid for his purchases up to 1883; for goods sold during that year he did not pay. In an action upon the guaranty, *held*, that it was not a continuing one, but referred simply to and covered the one transaction, *i. e.*, the goods ordered from the samples sent as requested; and that, therefore, plaintiff was not entitled to recover. *Schwartz v. Hyman*. 562

GUARDIAN AND WARD.

1. While an obligation due an infant may, with or without express words authorizing it, be discharged by payment to the guardian of the infant, it is with the qualification that the guardian is authorized to receive payment. *Wuesthoff v. Germania L. Ins. Co.* 580
2. The power of a parent to appoint, by deed or will, a guardian of his infant children, does not exist in the absence of a statute conferring it, and the legislature may define, limit and regulate the authority of guardians and prescribe the condition under which it shall be exercised. *Id.*
3. The provisions of the statutes of this state in reference to testamentary guardians relate exclusively to domiciliary guardianship, under wills or deeds of residents of this jurisdiction. The rights and powers of the guardian are strictly local, and circumscribed by the jurisdiction of the government which clothed him with his office. *Id.*
4. *It seems*, however, that a payment by a debtor in this state to a foreign guardian, will be good, if the guardian, by the law of the state from which he derives his appointment, is authorized to receive it. *Id.*
5. Defendant issued a policy of insurance on the life of W., payable to A., his wife. In case of her death before the death of the insured the policy provided that the amount of insurance "shall be payable to her children * * * or to their guardian, if under age." W. resided in New Jersey, where the policy was issued, and continued so to do up to the time of his death. He survived his wife and remarried. By his will he appointed his second wife guardian of his children by the first wife, who were infants. She, as such guardian, served on defendant notice and proof of the death of W., and of his first wife, and defendant thereupon paid to her the amount of the policy. The laws of New Jersey provide that a father may, by deed, or will, appoint a guardian for his minor children (N. J. R. S. 664, § 1), but by another section (p. 762, § 48), provide that every testamentary guardian "shall, before he exercises any authority over the minor or his estate, appear before the Orphans' Court and declare his acceptance of the guardianship * * * and shall give bond * * * for the faithful execution of his office unless it is otherwise directed by the testator's will." The guardian at the time of receiving payment on the policy had not declared her acceptance of the guardianship or given a bond as required. In an action by the children to recover the amount of the policy, *held*, that the case was to be governed by the laws of New Jersey; that the giving of security was a necessary prerequisite to the exercise of any authority by the guardian over the estate of the ward; that the guardian, therefore, was not authorized to receive payment; and that such payment was not a defense to the action. *Id.*
6. The policy was, by its terms, payable "sixty days after due notice and proof of the death." It was claimed by defendant that plaintiffs, by repudiating the act of the guardian in receiving payment also repudiated her act in giving notice, etc., and so that no notice or proof of death had been furnished. *Held*, untenable; that while the guardian had no power to interfere with the infant's estate before giving security, she had sufficient authority to take a step in the interest of the infants to accelerate the maturing of the claim; also, that defendant was precluded by accepting and acting upon the notice without objection. *Id.*
7. It was also claimed that, as the guardian had not qualified, there was no person authorized to receive payment, and, until there was, defendant was not liable. *Held* untenable; that the guardian *ad litem* was a guardian within the meaning of the policy, and was authorized to receive payment and execute a discharge. *Id.*

HABEAS CORPUS.

Where, upon hearing on *habeas corpus* before a justice of the Supreme Court, the relator was remanded to custody, and the General Term, on *certiorari*, directed to said justice as such, reversed the order and directed the discharge of the prisoner. *Held*, that said justice was not the proper person to take an appeal to this court; that the decision affected no substantial right of his within the meaning of the Code of Criminal Procedure (§ 519), or of any person of whom he was the legal representative or agent. *People ex rel. v. Lawrence.* 607

HIGHWAYS.

1. A tradesman may convey goods from a street to his adjoining store, and from the store to the street; and for that purpose may temporarily obstruct passage on the sidewalk. But such an obstruction must not only be necessary, with reference to the business of the tradesman, it must be reasonable with reference to the rights of the public. *Callanan v. Gilman.* 860
2. Defendant, a wholesale and retail grocer, having a store on a street in the city of New York, was in the habit of taking goods to and from his store by means of trucks. When loading or unloading a bridge was placed across the sidewalk, entirely obstructing it; and elevated above it at the inner end about twelve inches, at the outer about twenty. Persons passing when the bridge was in place were obliged to step upon the stoop of defendant's store and go around the end of the bridge which rested thereon. The bridge was usually removed when not in use, but it was sometimes left in position for ten or fifteen minutes, and when in use it sometimes remained in position from one to two hours, and on an average the sidewalk was thus obstructed from four to five hours of each business day between 9 A. M., and 5 P. M. *Held*, that such an extensive and continuous use of the sidewalk was

not reasonable, and constituted a nuisance. *Id.*

HUSBAND AND WIFE.

Where a married couple had separated, and pending an action for limited divorce brought by the wife against the husband, a settlement was agreed upon between them, and a contract entered into in pursuance thereof, to the effect that the property of the husband should be sold, and after payment of his debts, one third of the proceeds remaining should be paid to the wife, and that they should live separate. *Held*, that the contract was valid, and an action was maintainable to recover the portion of the proceeds so agreed to be paid to her. *Pettit v. Pettit.* 877

See MARRIED WOMEN.

IMPRISONMENT.

As to whether, in order to justify the detention of a defendant under the Code of Criminal Procedure (§ 486), it is necessary that the entry in the minutes, with a copy of which he is to be furnished, should show the offense, *quarre.* *People v. Bradner.* 1

INDICTMENT.

1. One count of an indictment for larceny charged, in substance, that the defendant, with intent to deprive a marine insurance company, of which his firm was the agent, of its property, and to appropriate the same to his own use, or that of some person or body corporate unknown, feloniously, falsely and fraudulently represented to said company that it had, through his firm, insured the cargo of a vessel, in the sum of \$5,000, for the benefit of some person or body corporate unknown; that a loss had occurred whereby the company had become legally liable to pay the amount of the insurance, and that, believing such repre-

- sentations to be true, the company did, at the city of Buffalo, pay over and deliver to the defendant the sum of \$4,975, whereas, in truth, the company had made no such insurance, and each and every of the representations were false, fraudulent and untrue, and the defendant "well knew such was the case." Defendant demurred to the indictment upon the ground that it did not conform to the requirements of the provisions of the Code of Criminal Procedure (§§ 275, 276, 284, 285), prescribing the form of an indictment. The defects specified were that it did not sufficiently charge the offense, because it did not state what the perils and risks were, which the defendant represented were insured against, or that he represented that a loss had occurred from a peril against which the company had insured, or that defendant represented that any person was insured, or that he knew of the falsity of the representations; also, that the property was not sufficiently described. *Held*, that the demurrer was properly overruled; also that, whether the representations made in the indictment were calculated to deceive, or capable of so doing, was a question of fact for the jury. *People v. Dimick*. 13
2. The indictment contained two other counts, one of which charged that defendant, in his firm name, drew upon the general agent of said company, duly authorized by it to pay in case the drawer was lawfully entitled to draw the draft, for \$4,975, when defendant and his firm, to his knowledge, were not lawfully entitled to draw for that or any other sum, and by color and aid of such draft he obtained of it the sum specified. The other count charged defendant, in substance, with secreting, withholding, taking and carrying away from the possession of said company, the true owner, the sum of \$4,975, and appropriating the same to his own use, or to that of some person or body corporate unknown. It was objected that the indictment was defective in charging more than one crime contrary to the Code of Criminal Procedure (§§ 278, 279). *Held*, untenable; that the indictment simply charged, in separate counts, as committed by different means, the same crime, larceny. (§§ 528, 529.)
8. The evidence showed that defendant drew upon McD., the general agent at New York, for the sum stated in the indictment, at three days sight; that the draft was sent to a bank in that city, and by it presented to McD., who paid it by giving a check upon another bank. It was claimed by defendant that the proof did not sustain the indictment, in that it charged that he obtained "money" by the fraud alleged, while the proof showed that the company parted with a draft instead of money. *Held*, untenable; that the bank presenting the draft must be deemed to have been defendant's agent, and payment to it was payment to him, and the bank upon which the check was drawn was to be treated as the agent of the insurance company in making the payment; and so, money was paid to defendant. *Id.*
4. The indictment herein charged defendant with perjury in verifying a quarterly report made by a state bank, of which he was cashier, to the banking department. The verifying affidavit was set forth in the indictment, which charged that defendant, at the time of making the affidavit, had full knowledge of the real and true condition of the bank and of the matters stated in the report, and that he well knew, when he swore to the affidavit, that the report and accompanying schedules were false and untrue, but wickedly and corruptly swore that they were true to the best of his knowledge and belief. The indictment then set forth specifically several statements contained in the report, in respect to each of which it averred that defendant well knew, at the time he swore to the report, that said statement was not true according to the best of his knowledge and belief, and that the fact was otherwise than as stated, specifying the difference. It was objected that the indictment was defective, in

that it did not directly allege that the statements in the report were, as matter of fact, untrue. *Held*, untenable; that the averments in the indictment amounted to an allegation that the statements were false. *People v. Clements*. 205

INJUNCTION.

1. N. was the owner of certain lands containing deposits of building sand and the sale of the sand constituted his only business. S. offered to purchase a small parcel of the land, but N. declined to sell on the ground that it would interfere with his business. S. agreed to purchase, covenanting not to sell any sand off from the parcel. N. thereupon sold and conveyed, his deed containing such a covenant on the part of the grantee. S. subsequently conveyed by warranty deed, to defendant, without covenants on the part of the latter, who, however, had notice before taking his deed of the covenant in the deed to his grantor. Defendant opened a pit on his land, sold sand therefrom and declared that he should continue to sell notwithstanding such covenant. *Held* (ANDREWS and EARL, JJ., dissenting), that an action was maintainable to restrain such sale. *Hodge v. Sloan*. 244
2. Defendant, a wholesale and retail grocer, having a store on a street in the city of New York, was in the habit of taking goods to and from his store by means of trucks. When loading or unloading a bridge was placed across the sidewalk, entirely obstructing it; and elevated above it at the inner end about twelve inches, at the outer about twenty. Persons passing when the bridge was in place were obliged to step upon the stoop of defendant's store and go around the end of the bridge which rested thereon. The bridge was usually removed when not in use, but it was sometimes left in position for ten or fifteen minutes, and when in use it sometimes remained in position from one to two hours, and on an average the sidewalk

was thus obstructed from four to five hours of each business day between 9 A. M., and 5 P. M. In an action to restrain the continuance of the nuisance, the complaint set forth the facts above stated, and also alleged, in substance, that plaintiffs were engaged in the same business and occupied the store adjoining defendant's; that a large portion of plaintiffs' customers, in order to reach their store, were obliged to pass in front of defendant's store; that the said obstruction prevented plaintiffs, their employees and patrons from passing along the sidewalk to and from plaintiffs' store, to the great detriment and injury of plaintiffs and their said business. *Held*, that there were sufficient averments of special damage to warrant proof of such damage, and upon such proof being made, to sustain a judgment granting the relief sought; that if the complaint was not sufficiently definite in its statements as to such damages, defendant should have moved to make it more definite, or for a bill of particulars; and, having taken issue and gone to trial, it was too late to object. *Callanan v. Gilman*. 360.

3. There was proof that some custom was turned from plaintiffs' store on account of the obstruction. *Held*, that this, with the other facts stated, justified a judgment in their favor; also, that defendant could not justify the unreasonable obstruction by proof that he permitted pedestrians to pass around over his elevated stoop or through his store. *Id.*
4. The judgment restrained defendant, his agents, etc., from obstructing the sidewalk in front of his store "by any plank-way or bridge, or other like obstruction elevated above the sidewalk, or from hindering plaintiffs, their employees and customers from the free and unobstructed use of the sidewalk." *Held*, that the judgment was too broad. Ordered, therefore, that it be modified so as to require the defendant to "refrain from unnecessarily and unreasonably obstructing" the sidewalk. *Id.*

INSURANCE (LIFE).

1. In an action upon a policy of life insurance the defense was a breach of warranty. The alleged breach was that an answer in the application to a question as to the age of the insured, was untrue. It appeared that the answer was written in by a general agent of the defendant; that the insured was a German, understanding the English language very imperfectly; that when asked his age he answered that he did not know, and when assured that it was necessary to be known he repeated his former statement; that the agent made some computation or estimate and entered his conclusion in the application, and that this was not read over to the insured after the answers were written in. No fraud was alleged or found. *Held*, that an estoppel *in pais* was fairly established which precluded defendant from setting up the falsity of the answer in avoidance of the policy. *Miller v. Phoenix Mut. L. Ins. Co.* 292
2. Defendant issued a policy of insurance on the life of W., payable to A., his wife. In case of her death before the death of the insured the policy provided that the amount of insurance "shall be payable to her children * * * or to their guardian, if under age." W. resided in New Jersey, where the policy was issued, and continued so to do up to the time of his death. He survived his wife and remarried. By his will he appointed his second wife guardian of his children by the first wife, who were infants. She, as such guardian, served on defendant notice and proof of the death of W., and of his first wife, and defendant thereupon paid to her the amount of the policy. The laws of New Jersey provide that a father may, by deed or will, appoint a guardian for his minor children (N. J. R. S. 664, § 1), but by another section (p. 762, § 48), provide that every testamentary guardian "shall, before he exercises any authority over the minor or his estate, appear before the Orphan's Court and declare his acceptance of the guardianship * * * and shall give bond * * * for the faithful execution of his office unless it is otherwise directed by the testator's will." The guardian at the time of receiving payment on the policy had not declared her acceptance of the guardianship or given a bond as required. In an action by the children to recover the amount of the policy, *held*, that the case was to be governed by the laws of New Jersey; that the giving of security was a necessary prerequisite to the exercise of any authority by the guardian over the estate of the ward; that the guardian, therefore, was not authorized to receive payment; and that such payment was not a defense to the action. *Wuesthoff v. Germania L. Ins. Co.* 580
3. The will was executed under seal. It was claimed that the statutory limitation did not apply, as that relates to a guardian appointed by will, while here the appointment was by deed. *Held* untenable; that the unnecessary addition of a seal did not change the character of the instrument or justify treating it as in part a will and in part a deed. *Id.*
4. The policy was, by its terms, payable "sixty days after due notice and proof of the death." It was claimed by defendant that plaintiffs, by repudiating the act of the guardian in receiving payment also repudiated her act in giving notice, etc., and so that no notice or proof of death had been furnished. *Held* untenable; that while the guardian had no power to interfere with the infants' estate before giving security she had sufficient authority to take a step in the interest of the infants to accelerate the maturing of the claim; also, that defendant was precluded by accepting and acting upon the notice without objection. *Id.*
5. It was also claimed that, as the guardian had not qualified, there was no person authorized to receive payment, and, until there was, defendant was not liable. *Held* untenable; that the guardian *ad litem* was a guardian within the meaning of the policy, and was authorized

to receive payment and execute a discharge. *Id.*

INSURANCE (MARINE).

Marine insurance may lawfully be effected upon property "lost or not lost," but that phrase in a policy always has reference to cases where property has started upon its voyage and the parties have no knowledge as to whether it has been lost or not. In case the property has, to the knowledge of the parties, been lost, there can be no valid or lawful insurance. *People v. Dimick.* 18

INTERPLEADER.

1. Where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant and the original defendant has been discharged, on payment into court of the amount of the demand, in pursuance of the provision of the Code of Civil Procedure (§ 820), the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a trial by jury. *Clark v. Mosher.* 118

2. Where, therefore, in such an action the trial judge empaneled a jury and submitted to them a single question of fact, but disregarded their finding and found the fact the contrary. *Held*, that a judgment entered pursuant to the findings and conclusions of the court was regular. *Id.*

JUDGMENT.

1. The omission of the clerk in his entry of judgment in a criminal action to state the offense for which the conviction was had, as required by the Code of Criminal Procedure (§ 485), does not render the sentence void. The defect is amendable, and, upon appeal to this court, other parts of the record may be referred to, and if they furnish evidence of the fact so omitted in the entry, the court

may conform the entry to the fact. (§ 548.) *People v. Bradner.* 1

2. *It seems* the provision of the Code of Civil Procedure (§ 408), declaring that "the term of eighteen months after the death of a person within this State, against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator," does not apply to the provision (§ 876), declaring that a judgment shall be conclusively presumed to be paid after twenty years from the time the party recovering it was entitled to a mandate to enforce it, except as against one, who, within the twenty years has made a payment or acknowledged an indebtedness thereon, and there is no provision contained in the Code which, under any circumstances, extends the time within which an acknowledgment or payment must be made in order to rebut the otherwise conclusive presumption of payment after the lapse of twenty years. *In re Kendrick.* 104

3. W. recovered a verdict against K. in May, 1868; K. died intestate in January, 1888; his administrator qualified in February, 1888; W. presented his claim in March, 1884. In February, 1884, a petition was presented by other judgment-creditors asking that the administrator of K. be required to pay their judgment. The administrator by his answer thereto, verified and filed in March, 1884, set up the judgment recovered by W.; that it was entitled to a priority; that notice of the claim thereon had been presented and that the assets were insufficient to pay it. *Held*, that, conceding the eighteen months exclusion applied, this answer was not a sufficient acknowledgment to revive the W. judgment, as he was not a party to the proceeding in which the answer was interposed. *Id.*

4. An admission or acknowledgment made to a stranger, not intended to be communicated to or to influence the conduct of a judgment-creditor, is not effectual to

- rebut the presumption of payment so arising or (*if seems*) to revive a debt barred by the statute of limitations. *Id.*
6. A petition by the administrator for a judicial settlement of his accounts was verified November 20th and filed November 28, 1884. Among the names set forth therein of those interested in the estate as creditors, etc., was that of W. The petition did not specify the amount or date of judgment or that any amount was due thereon. The administrator's account, which was verified at the same time with the petition, set forth said judgment and stated that the claim thereon was disputed by the administrator. *Held*, that the statement in the petition did not amount to a written acknowledgment of the debt. *Id.*
8. On the hearing before the surrogate in January, 1885, an order was made on motion of the administrator allowing the account to be amended, by striking out the statement that the W. judgment was a disputed claim. Previous to this another judgment-creditor had filed objections to the claim on the W. judgment, on the ground that it was barred by the statute. *Held*, that it was out of the power of the administrator at that stage to bind the contesting creditors by any acknowledgment of the W. judgment as a subsisting claim. *Id.*
7. A judgment must be rendered in conformity with the allegations and proofs of the parties. *Day v. Town New Lots.* 148
8. A judgment recovered against the trustees of a school district, upon a contract entered into by them on behalf of the district, binds them individually, and may be collected by execution out of their individual property. (Code Civ. Pro., §§ 1927, 1929, 1981; Laws of 1864, chap. 555, tit. 18, §§ 6-11.) *People ex rel. v. Abbott.* 225
9. Where an action for partition is commenced by one who is, under the Code of Civil Procedure (§ 1588), a proper party in the action, but is not "a joint tenant or tenant in common" and so, not entitled to be a plaintiff in the action, the defect is not jurisdictional, and a decree directing a sale if erroneous, is not absolutely void; if, therefore, no appeal is taken, the judgment is conclusive upon the parties. *Reed v. Reed* 545
10. Accordingly, *held*, that the defect was no objection to the title offered a purchaser on such a sale, and that his motion to be relieved from the sale was properly denied. *Id.*
11. An appeal may not be taken to this court from an interlocutory judgment. (Code of Civ. Pro., §§ 190, 191.) *King v. Barnes.* 645
12. A judgment which, although it finally determines certain matters in controversy, orders an accounting before a referee, is an interlocutory judgment. *Id.*
- Where judgment in action to restrain continuance of a nuisance too broad.
See Callanan v. Gilman. 800
- ### JUDICIAL SALES.
1. Where an action for partition is commenced by one who is, under the Code of Civil Procedure (§ 1588), a proper party in the action, but is not "a joint tenant or tenant in common" and so, not entitled to be a plaintiff in the action, the defect is not jurisdictional, and a decree directing a sale, if erroneous, is not absolutely void; if, therefore, no appeal is taken, the judgment is conclusive upon the parties. *Reed v. Reed.* 545
2. Accordingly, *held*, that the defect was no objection to the title offered a purchaser on such a sale, and that his motion to be relieved from the sale was properly denied. *Id.*
- ### JURISDICTION.
1. *It seems* that where the record on appeal in a criminal action from a judgment of a court of general

- jurisdiction discloses upon its face that the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded, or that there was some other fundamental defect in the proceeding which could not be waived or cured, it is the duty of the appellate tribunal to reverse, although the question was not formally raised in the court below, and is not presented by any ruling or exception on the trial. *People v. Bradner.* 1
2. Where an indictment is found in a Court of Oyer and Terminer, to give jurisdiction to the Court of Sessions to try it, there must be an order of the Oyer and Terminer remitting it to the Sessions for trial. *Id.*
 3. To sustain, however, upon appeal a judgment of the Court of Sessions on trial of such an indictment, it is not essential that the record should affirmatively show that such an order was made; in the absence of proof to the contrary this will be presumed. The Court of Sessions is a superior court, and its jurisdiction is presumed. *Id.*
 4. The distinction between limitation of jurisdiction and inferiority of jurisdiction pointed out. *Id.*
 5. To give this court jurisdiction to review a decision of the General Term, reversing a judgment and granting a new trial in an action tried by a jury, the General Term order must show the facts conferring the jurisdiction. It is sufficient to render a consideration of the appeal impossible that the General Term may have reversed upon a question of fact. *Pharis v. Gere.* 281
 6. The record on appeal from such an order contained a recital, immediately following the statement of rendition of the verdict, that "the court thereupon denied the motion of the defendant for a new trial upon the minutes." Following this was a formal order stating the making of a motion for a new trial on the minutes, and that "said motion be and the same is hereby denied." Then followed an order of the General Term, which recited an appeal from the order denying the motion for a new trial and from judgment, and reversed both the order and the judgment and granted a new trial. The case also disclosed that there were disputed questions of fact. On appeal from the General Term order, *held*, that said court had jurisdiction of the questions of fact, and it was to be assumed that its order was based upon some one of the grounds mentioned in the provision of the Code of Civil Procedure (§ 999), in reference to motions for new trial on the minutes, and as it could not be said that the reversal was not upon a question of fact the order was not reviewable here. *Id.*
 7. A defect may be in one sense jurisdictional, as regards the authority of assessors acting under an existing law, and yet not so as it respects the power of the legislature to pass a statute curing the defect. *Enslgn v. Barre.* 829
 8. An omission of the dollar mark in the statement in a tax-roll and warrant of the amount of a tax is not a jurisdictional defect. *Id.*
 9. Where an assessment-roll, made out in 1849, was not signed by the assessors as required by the provisions of the statute then in force (1 R. S. § 998, § 26), but the certificate, which was written upon the roll itself and which referred to it as the "above assessment-roll" and as having been the work of the assessors, was signed. *Held*, that the defect was not jurisdictional. *Id.*
 10. *It seems* that if the certificate had been written on a separate piece of paper and attached to the roll, the conclusion would have been the same. *Id.*
 11. In that part of the certificate which related to the mode of valuation the words "solvent creditor" were written instead of "solvent debtor." *Held*, that this was not a jurisdictional defect. *Id.*

12. The assessment was for a county and highway tax, no number of the road district or date of the commissioners' warrant was given. *Held*, it was not requisite that these details should appear on the assessment-roll. *Id.*

18. The sale was in 1852. The county treasurer's notice of sale was not delivered to the printers for publication on or before the first day of September, as required by the act of 1850 (Chap. 298, Laws of 1850). The day of sale was the first Tuesday in December; the notice was dated September fifteenth; it was published once in each week for the prescribed ten weeks. *Held*, that the defect was not jurisdictional. *Id.*

JURY.

1. Where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant, and the original defendant has been discharged, on payment into court of the amount of the demand, in pursuance of the provision of the Code of Civil Procedure (§ 820), the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a trial by jury. *Clark v. Mosher*. 118

2. Where, therefore, in such an action, the trial judge empaneled a jury and submitted to them a single question of fact, but disregarded their finding and found the fact the contrary, *held*, that a judgment entered pursuant to the findings and conclusions of the court was regular. *Id.*

LANDLORD AND TENANT.

See LEASE.

LARCENY.

1. One count of an indictment for larceny charged, in substance, that the defendant, with intent to de-

prive a marine insurance company of which his firm was the agent, of its property, and to appropriate the same to his own use, or that of some person or body corporate unknown, feloniously, falsely and fraudulently represented to said company that it had, through his firm, insured the cargo of a vessel, in the sum of \$5,000, for the benefit of some person or body corporate unknown; that a loss had occurred whereby the company had become legally liable to pay the amount of the insurance, and that, believing such representations to be true, the company did, at the city of Buffalo, pay over and deliver to the defendant the sum of \$4,975, whereas, in truth, the company had made no such insurance, and each and every of the representations were false, fraudulent and untrue, and the defendant "well knew such was the case." Defendant demurred to the indictment upon the ground that it did not conform to the requirements of the provisions of the Code of Criminal Procedure (§§ 275, 276, 284, 285), prescribing the form of an indictment. The defects specified were that it did not sufficiently charge the offense, because it did not state what the perils and risks were, which the defendant represented were insured against, or that he represented that a loss had occurred from a peril against which the company had insured, or that defendant represented that any person was insured, or that he knew of the falsity of the representations; also that the property was not sufficiently described. *Held*, that the demurrer was properly overruled; also that, whether the representations made in the indictment were calculated to deceive, or capable of so doing, was a question of fact for the jury. *People v. Dimick*. 13

2. The indictment contained two other counts, one of which charged that defendant, in his firm name, drew upon the general agent of said company, duly authorized by it to pay in case the drawer was lawfully entitled to draw the draft, for \$4,975, when defendant

and his firm, to his knowledge, were not lawfully entitled to draw for that or any other sum, and by color and aid of such draft he obtained of it the sum specified. The other count charged defendant, in substance, with secreting, withholding, taking and carrying away from the possession of said company, the true owner, the sum of \$4,975, and appropriating the same to his own use, or to that of some person or body corporate unknown. It was objected that the indictment was defective in charging more than one crime contrary to the Code of Criminal Procedure (§§ 278, 279). *Held*, untenable; that the indictment simply charged, in separate counts, as committed by different means, the same crime, larceny. (§§ 528, 529.) *Id.*

3. Upon the trial of the indictment *McD.*, the general agent upon whom the draft was drawn by defendant, was called as a witness by the People. On cross-examination he was questioned as to a civil action commenced by the insurance company against defendant, in which he had verified the complaint. He was asked what he swore to as to a particular matter, and gave answers showing that the complaint contained an allegation somewhat at variance with his testimony on direct-examination. After redirect-examination the district attorney offered in evidence a copy of the complaint. The court received it in evidence for the purpose of showing what the witness had sworn to, stating that it could not "be evidence upon any other point." The complaint contained thirteen counts, only one of which related to the matter inquired of on cross-examination. *Held*, that the ruling was not error; that, while the whole complaint was not competent, the district attorney had the right to prove the whole and to read so much of it as related to the cross-examination, and which tended to explain or qualify the testimony so elicited; and that a fair construction of the ruling of the trial judge was that he received the complaint only for the

purpose of showing what *McD.* had testified as to the matter inquired of upon the cross-examination. *Id.*

LEASE.

1. Plaintiff's assignor leased to defendants a bonded warehouse and other premises for a term of one year from November 1, 1880, the lessees covenanting to surrender at the end of the term, to pay the rent for the term and "for such further time" as they may hold the premises. Bonded goods belonging to defendants and placed in the warehouse before the expiration of the term, were left there until December 23, 1881, in consequence of defendants' inability to remove them without the consent of the government officials. On that day the government locks were removed, the goods taken away and the keys of the buildings were left at a place designated by plaintiff. Plaintiff, claiming that by the holding over he had the right to elect to hold the lessees for another year upon the terms of the lease, brought this action to recover the rent. *Held*, that, it appearing by the lease, the parties anticipated a holding over by the tenants and expressly provided for it, the holding over was not wrongful or such as enabled the landlord at his option to treat the tenants as wrongdoers or hold them for the rent of the second year, and that they were only liable up to the time of the surrender of the premises. *Pickett v. Bartlett.* 277

2. Plaintiff leased certain premises, which had been occupied as a dwelling-house to defendant, to be used as a public school. The requisite alterations in the interior were permitted by the lessor and the lessee covenanted to make them and also to surrender the premises at the expiration of the lease "in the same condition as they were at the execution of this lease, reasonable use and wear thereof as a public school and damages by the elements excepted." The lessees changed the dwelling-house into school rooms, removing partitions,

etc. This lease was followed by three others in similar form, each executed before the termination of the preceding one. After the termination of the last lease and the surrender of the premises, this action was brought, among other things, to recover damages for a breach of the covenants as to condition on surrender. Plaintiff proved that the premises were in good condition when leased, and that when surrendered the walls, floor and glass in the windows were broken, the basement filled with refuse and the sidewalk broken by dumping coal thereon, some of the balusters of the stairs gone, etc. *Held*, that defendant was not bound to restore the premises to their former condition as a dwelling-house; but that the evidence showed other damages, and the question as to whether or not they resulted from a reasonable use of the premises for school purposes was one of fact, and a submission of the same to the jury was proper. *McGregor v. Bd. Edn.* 511

3. Also, *held*, that plaintiff was not required to show the separate damage at the end of each term; it was sufficient to prove a breach of covenant, referable to one or more or all of the leases; also, that the delivery of each new lease was not a waiver, and did not estop plaintiff from claiming a breach of the covenant in the former one. *Id.*

4. The rule that where there has been an implied surrender of possession by a tenant, by acceptance of a new lease, he loses all rights dependent upon the continued existence and validity of the surrendered lease, applies simply to such rights as can exist only while the lease continues; it does not extinguish rights of action already accrued. *Id.*

5. A lease for a term of twenty-three years contained a covenant on the part of the lessee to build on the demised premises within six years from its date a building as specified, and in default of such erection it was declared that the estate granted should cease. If the building should be erected within the time

specified and should be standing at the expiration of the term, the lease provided that the lessors would, at their option, either grant a new lease for a further term, or pay the fair value of the dwelling; the rent for the new term or the value of the building to be determined by appraisers, one to be selected by each party. In case of default by either party in nominating an appraiser the one nominated by the other was to select the other. In case of the disagreement of the appraisers they were to appoint an umpire, the decision of the majority to be final. Before the expiration of the six years the lessor executed to S., assignee of the lessee, a release which, after reciting the covenant to build, released S. therefrom, and declared that the lease should "in all its parts" thereafter be acted upon "the same as though such covenant had not been inserted therein;" also that the purpose of the release was to exonerate S., his heirs and assigns from all obligation arising from or growing out of the covenant. Before expiration of the term S. did erect upon the premises a dwelling-house of the description specified in the lease. In an action to compel a specific performance by the lessors, *held*, that the release discharged S. from any obligation to build, and if at the expiration of the lease no building erected under and as authorized by the provisions of the lease had been standing on the premises, the defendant would neither have been bound to renew the lease or pay the value of any building. But *held*, that the right to build during the term was preserved, and S., having availed himself of it, was entitled to the exercise by the defendant of the option either to pay the appraised value or to renew the lease. *Smith v. Rector, etc.* 610

6. The lease contained a covenant on the part of the lessee or assigns, that he or they would not let all or any part of the premises, or assign or transfer the lease without first having obtained the consent of the lessors in writing. The building erected by S. was an apartment house; he occupied one range of rooms, the others he let to tenants

by the month by verbal lease. This was known by defendant, and for eight years after the erection it received rent from S. without objection. *Held*, that this was, in effect, a license to use and occupy the premises as an apartment-house, and estopped defendant from claiming a forfeiture of the lease, because of such use. *Id.*

7. As to whether the consent by defendant to the assignment to plaintiff was not a waiver of the covenant, *quære*. *Id.*

8. The judgment authorized defendant to appoint an appraiser to act with one appointed by plaintiff, and in case of neglect so to do, provided that the appraiser named by plaintiff might select another to act with him in fixing the valuations and, when determined, required defendant either to pay the value of the building or execute a new lease. It was claimed here by defendant that an action for specific performance could not be maintained by plaintiff until after he had procured the valuation to be made in the manner specified in the lease. *Held*, that as the objection was not taken on the trial it was not available here. *Id.*

9. Also, *held*, the rule that a court of equity will not entertain an action for specific performance of an agreement to arbitrate did not apply, as the judgment did not compel defendant to appoint an arbitrator, and the appraisers, when appointed, will be appraisers selected by the parties in precise accordance with their agreement. *Id.*

10. Also, *held*, that defendant could not refuse to give a new lease and turn the plaintiff, for his remedy, to an action at law on the covenant. *Id.*

11. Also, *held*, that the judgment should be modified by incorporating a provision for the appointment of an umpire in the contingency mentioned in the lease. *Id.*

— *Lease made by railroad corporation, validity of.*
Day v. O. and L. C. R. R. Co., 129

LEGISLATURE.

1. The section of the Penal Code (§ 79), declaring that any person offending against the sections thereof relating to bribery "is a competent witness against another person so offending, and may be compelled to testify upon any trial, hearing, proceeding or investigation," embraces legislative proceedings or investigations. *People v. Sharp*. 427

2. Notwithstanding the vesting of judicial power in the courts, certain powers, in their nature judicial, belong to the state legislature and may be delegated to a committee, with authority to take testimony and summon witnesses, and a refusal to appear and testify in obedience to the subpoena of such a committee is a contempt, and under the Penal Code (§§ 68, 69) renders the person guilty of a misdemeanor. *Id.*

3. Where a person attends before a legislative committee in obedience to its subpoena and is sworn and examined as a witness, he cannot be deemed a willing or consenting witness, and he does not waive the privilege given by said section by not asserting it before the committee. *Id.*

4. The terms of a preamble and resolution directing an investigation, may be looked to to determine the legislative intent. *Id.*

5. An indictment for bribery under the Penal Code (§ 76), charged the defendant with offering and giving to F., a member of the common council of the city of New York, a specified sum of money, with intent to influence him in the exercise of his powers and functions as such member, upon the application of the Broadway Surface Railroad Company for the consent of the common council to the construction of its railway. On the trial, it was proved that a bribe had been given to and accepted by F., also, that defendant was subpoenaed as a witness and attended in obedience to the subpoena before a committee of the

state senate appointed to investigate the methods adopted by the company in obtaining such consent. The preamble and resolutions appointing the investigating committee, were given in evidence. The former referred to the provisions of the Constitution and the statutes relating to street railways requiring the consent of the local authorities, and recited that the charge was made that the consent to the railroad upon Broadway was obtained by fraud and through corrupt influence and bribery of members of the common council, and the committee was authorized by the resolutions to investigate fully the action of the board of aldermen of said city which granted or gave the consent "or of any member thereof who voted for the same in respect thereto." The sergeant-at-arms of the senate was directed to attend the sitting of the committee, serve subpoenas, etc. The prosecution was then allowed to prove under exception and objection the testimony so given by defendant, which tended to show his complicity in the crime. *Held*, error; that the senate had power to authorize the investigation; that the testimony was to be considered as given under compulsion; that the case was covered by said section; and, therefore, that the testimony so given was privileged. *Id.*

LICENSE.

1. Plaintiff leased of defendant W. rooms on the second floor of a building in the city of New York, the lower story of which was occupied as a store. W. was also the owner of four adjoining buildings, the lower stories of which were occupied as stores and the upper by tenants occupying apartments. W., desiring to make certain alterations and improvements in his stores, procured the plaintiff and other tenants occupying rooms over the stores under separate leases, to sign an instrument, not under seal, whereby for an expressed consideration of one dollar, the receipt whereof they acknowledged, they agreed to permit W. to make any alterations he might "deem necessary to carry out the plans and specifications in changing the house." No consideration was, in fact paid. In an action to recover damages for alleged trespasses, in which the acts complained of were claimed by defendants to have been done in the making of the alterations referred to, plaintiff was nonsuited. *Held*, that the instrument was not valid as an agreement; that not being under seal it was not entitled to the common law or statutory presumption of consideration, and it being shown there was no consideration in fact paid, there was no presumption of an agreement to pay the consideration expressed; that in any event such an inference could only be drawn by the jury, not by the court; that considering the instrument as a license, it was not conclusive and binding against plaintiff as evidence, but could be explained, varied or contradicted by oral evidence, and could be revoked before it was acted upon; and evidence having been given by plaintiff that the license actually given and intended to be given related only to certain alterations which were completed before the commission of the trespasses complained of, also, that the license was revoked before acted upon, the ruling was error. *Fargis v. Walton.* 898
2. *It seems* that courts are quite disinclined, by the application of the rules relating to *estoppel in pais*, to give to mere licenses, based upon no consideration, the force and effect of absolute agreements, and the case must be quite peculiar and exceptional which will authorize a licensee to proceed under his license after its revocation. *Id.*
3. A lease contained a covenant on the part of the lessee or assigns, that he or they would not let all or any part of the premises, or assign or transfer the lease without first having obtained the consent of the lessors in writing. The lease provided for the erection by the lessee of a building upon the premises; the building erected was an apartment-house; the lessee occupied one range of rooms, the others he

let to tenants by the month by verbal lease. This was known to the lessor, and for eight years after the erection it received rent without objection. *Held*, that this was, in effect, a license to use and occupy the premises as an apartment-house, and estopped the lessor from claiming a forfeiture of the lease, because of such use. *Smith v. Rector, etc.* 610

LIENS.

One F., a resident of Pennsylvania, on March 24, 1881, executed to plaintiffs, in that state, an instrument, in form an absolute bill of sale, but in fact given as a chattel mortgage on a canal boat owned by him, then lying in the Erie canal in the town of G. F. in this state. An agent of the mortgagee filed a copy of the mortgage on the next day in the town clerk's office of said town, and went on board the boat and assumed possession thereof. Defendant, however, had previously on the same day, as sheriff, levied upon the boat by virtue of an attachment against F., and subsequently sold it on execution. The mortgagee and attaching creditors were also residents of Pennsylvania. In an action for a conversion of the boat *held*, that both under the provisions of the Revised Statutes relating to chattel mortgages and the act in relation to liens on canal boats (§§ 1 and 2, Chap. 412, Laws of 1864), the instrument was void and plaintiffs were not entitled to recover. *Keller v. Puine.* 88

See CHATTEL MORTGAGE.
MORTGAGE.

LIMITATION OF ACTIONS.

1. If, at the time of the discovery of a fraud, the party injured has a legal capacity to act and to contract, his right of action accrues and the statute of limitations begins to run against it, irrespective of the degree of intelligence possessed by him, or of his freedom

from undue influence, or his ability to resist it. *Piper v. Hoard.* 67

2. The fact, therefore, that the person injured was, after a discovery of fraud, induced by other fraudulent representations, or by undue influence, to refrain from prosecuting until the time limited by the statute has expired, is no answer to a plea of the statute. It must be made to appear that at the time of the discovery he had not the legal capacity to act. *Id.*

3. Accordingly *held*, where the owner of real estate was induced to convey the same by fraudulent representations and undue influence on the part of the grantee, and after discovery of the fraud commenced an action against the grantee to set aside the conveyance because thereof, but was induced by further fraudulent representations and undue influence to discontinue the same, that another action to set aside said conveyance, commenced more than ten years after the discovery of the original fraud, was barred by the statute. *Id.*

4. Under the provision of the General Manufacturing Act (§ 24, Chap. 40 Laws of 1848), declaring "that no suit shall be brought against any stockholder" of a company organized under said act "who shall cease to be a stockholder * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," whenever a stockholder shall be divested of his interest in or control over the affairs of the corporation, by actual dissolution thereof by formal judgment, or by a surrender of its corporate rights, privileges and franchises, the time begins to run, and at the end of two years therefrom the stockholder is no longer liable for any debt of the corporation. *Hollingshead v. Woodward.* 96.

5. In an action seeking to charge defendant as a stockholder of such a corporation with a judgment against it, on the ground that the whole capital stock was not paid

in, or a certificate of payment filed as required by the act, the answer set up among other things, in substance, that more than four years before the commencement of the action a judgment was rendered in an action against the corporation sequestrating its property, appointing a permanent receiver thereof and restraining its officers and agents from all interference with it; that said corporation has not since transacted any business; that the receiver took possession of the property and has distributed the proceeds among creditors pursuant to order of the court, the same not being sufficient to pay all of the company debts, and that defendant by reason thereof ceased to be a stockholder from the date of said judgment. On demurrer *held*, that the answer set up a good defense; that by the conceded facts it appeared that when the organization was divested of its rights, privileges, franchises and property by virtue of the appointment of a receiver, it for all practical purposes ceased to exist, and the defendant ceased to be a stockholder within the meaning of the act, and after the expiration of two years he was discharged from all liability.

Id.

6. *It seems* the provision of the Code of Civil Procedure (§ 403), declaring that "the term of eighteen months after the death of a person within this State, against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator," does not apply to the provision (§ 376), declaring that a judgment shall be conclusively presumed to be paid after twenty years from the time the party recovering it was entitled to a mandate to enforce it, except as against one, who, within the twenty years has made a payment or acknowledged an indebtedness thereon, and there is no provision contained in the Code which, under any circumstances, extends the time within which an acknowledgment or payment must be made in order to rebut the otherwise conclusive presumption of payment after the

lapse of twenty years. *In re Kendrick.* 104

7. W. recovered a verdict against K. in May, 1883; K. died intestate in January, 1883; his administrator qualified in February, 1883; W. presented his claim in March, 1884. In February, 1884, a petition was presented by other judgment-creditors asking that the administrator of K. be required to pay their judgment. The administrator by his answer thereto, verified and filed in March, 1884, set up the judgment recovered by W.; that it was entitled to a priority; that notice of the claim thereon had been presented and that the assets were insufficient to pay it. *Held*, that conceding the eighteen months exclusion applied, this answer was not a sufficient acknowledgment to revive the W. judgment, as he was not a party to the proceeding in which the answer was interposed. *Id.*

8. An admission or acknowledgment made to a stranger, not intended to be communicated to or to influence the conduct of a judgment-creditor, is not effectual to rebut the presumption of payment so arising or (*it seems*) to revive a debt barred by the statute of limitations. *Id.*

9. A petition by the administrator for a judicial settlement of his accounts was verified November 20th and filed November 28, 1884. Among the names set forth therein of those interested in the estate as creditors, etc., was that of W. The petition did not specify the amount or date of judgment or that any amount was due thereon. The administrator's account, which was verified at the same time with the petition, set forth said judgment and stated that the claim thereon was disputed by the administrator. *Held*, that the statement in the petition did not amount to a written acknowledgment of the debt. *Id.*

10. On the hearing before the surrogate in January, 1885, an order was made on motion of the administrator allowing the account to

- be amended, by striking out the statement that the W. judgment was a disputed claim. Previous to this another judgment creditor had filed objections to the claim on the W. judgment, on the ground that it was barred by the statute. *Held*, that it was out of the power of the administrator at that stage to bind the contesting creditors by any acknowledgment of the W. judgment as a subsisting claim. *Id.*
11. The provision of the Code of Civil Procedure (§ 382, sub. 5), applying a six years limitation to actions "to procure a judgment other than for a sum of money on the ground of fraud, in a case," formerly "cognizable by the Court of Chancery," does not apply to an action by the owner of the fee to remove a cloud upon title to land, by the cancellation of a mortgage thereon, to which the owner has a good defense. *Schoener v. Lissauer.* 111
12. The right to bring such an action is never barred by the statute of limitations. *Id.*
13. The complaint herein alleged, in substance, that plaintiff purchased certain premises on a mortgage foreclosure sale, and paid the sum bid to the referee making the sale, who made the payments directed by the decree and by order of the court deposited the surplus with the county clerk; that on or about February, 1874, defendant's collector received \$2,197.83 of such surplus from said clerk, and applied it upon a warrant held by him for the collection of an assessment on the premises for a local improvement, which assessment was subsequently adjudged to be illegal and void, and that \$1,499.98 of said sum so received "belonged to and was and still is the property of plaintiff," and was so taken and received without his knowledge or consent. The action was commenced in January, 1884. *Held*, that if any liability was incurred by defendant it was barred by the statute of limitations. *Day v. Town New Lots.* 148
14. Where one receiving money in his own right is afterwards, by evidence or construction changed into a trustee, he may plead the statute of limitations as a bar in an action to recover the money. *Price v. Mulford.* 303
15. In 1868, W., of the firm of M. & W., was county treasurer. In July of that year he transferred in the name of his firm to his successor in office an obligation or certificate of indebtedness, which had been transferred to the firm, as security for a certain court fund which had come into his hands as treasurer. In the official book containing his account of court funds was an entry under date of January 1, 1868, stating the balance on hand to the credit of said fund and that the same was invested in said certificate. At that time the firm was indebted to W. and on the books of the firm the certificate was charged to W. on account of that debt. In an action brought in 1883 to charge the firm with the amount of said certificate on the ground that the money went to its benefit, in which M. alone appeared and defended, there was no evidence of any personal participation by him in any of the transactions and no charge of fraud was made or proved against him. *Held*, that the cause of action, if any, arose in 1868, and that the statute of limitations was a bar. *Id.*
16. An order on a third person for the payment of money, in the absence of evidence showing a different relation between the drawer and payee is an acknowledgment in writing by the former of a debt within the statute of limitations (Code Pro., § 110; Code Civ. Pro., § 395), and continues the debt for a period of six years from its date. *Manchester v. Bradner.* 346
17. Such an order does not import that the debt so acknowledged is only to be paid out of the fund against which it is drawn. *Id.*
18. To constitute an acknowledgment of a debt, such as will take it out of the statute, the writing must acknowledge an existing debt, and must contain nothing inconsistent

with an intention on the part of the debtor to pay. *Id.*

19. Oral evidence, however, may be resorted to, as in other cases of written instruments, in aid of the interpretation. *Id.*

MANDAMUS.

1. Where, an action was brought against school trustees to recover the salary of a teacher, which was defended by them without direction or instruction of a district meeting, and judgment was recovered against them, which was affirmed on appeal, *held*, that, in the absence of any action on the part of the district at any district meeting, or application by the trustees to the county judge to have the costs and expenses allowed, a writ of *mandamus* was improperly issued directing the trustees to forthwith pay the costs embraced in the judgment, or deliver to the plaintiff in the action an order on the collector of the school district for the amount thereof. *People ex rel. v. Abbott.* 225

2. The remedy by writ of *mandamus* may only be resorted to where a clear legal right is made to appear and there is no other adequate or legal means to obtain it. *People ex rel. v. Bd. Police.* 235

3. When asked against public officers to compel the performance of an alleged public duty, the granting or refusing of the writ is somewhat a matter of discretion. *Id.*

4. The relators, claiming to represent the United Labor Party of the city of New York, which party they allege polled more than 50,000 votes at "the next preceding election," on proof that the board of police had refused to appoint inspectors of election of the political faith and opinion of that party as required by the amendment of 1887 (Chap. 490, Laws of 1887), of the consolidation act, applied for a peremptory writ of *mandamus* to compel such appointment which

was denied. The record on appeal to this court showed that two other organizations claimed to be the sole and proper representatives of the voters who deposited the votes in question and that they were entitled to the additional inspectors. *Held*, that the writ was properly denied; that in the exercise of a legal and proper discretion, upon being satisfied from the record that there was an honest dispute as to material facts which should be determined, the court was justified in refusing a peremptory writ, although the issues were in a strict and technical construction of the papers inartificially or loosely made up. *Id.*

5. An alternative writ was granted, to which two of the four members of the board made a return, the other two refusing to join therein. *Held*, that the return was properly received and entertained; that the court would not be driven into issuing a peremptory writ to guide the conduct of public officers charged with a public duty upon any narrow construction of a return to its alternative writ, where from all the papers it is seen that there is a substantial and material issue of fact. *Id.*

6. The relator was incorporated under the general act of 1848 (Chap. 265, Laws of 1848), for the purpose of constructing and maintaining electrical conductors to be placed under the streets in the city of New York. It received from the common council of the said city, by virtue of the power conferred on that body by the act of 1879 (Chap. 397, Laws of 1879), permission to construct conduits and lay wires in certain streets, the work to be done under the supervision of the commissioner of public works. In 1883 the relator filed with the county clerk certain maps, etc., as required by the ordinance, and in 1886 made application to the department of public works for permission to make excavations in certain streets in order to lay its wires and conductors, which was refused on the ground that the relator had not obtained the approval of the subway commissioners ap-

pointed pursuant to the act of 1885 (Chap. 499, Laws of 1885), as required by said act. In proceedings to obtain a peremptory *mandamus* requiring said commissioners to grant the permit, *held*, that the application for the writ was properly denied. *People ex rel. v. Squire.* 593

MANUFACTURING CORPORATIONS.

1. Under the provisions of the General Manufacturing Act (§ 24, Chap. 40, Laws of 1848), declaring "that no suit shall be brought against any stockholder" of a company organized under said act "who shall cease to be a stockholder * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," whenever a stockholder shall be divested of his interest in or control over the affairs of the corporation by actual dissolution thereof by formal judgment, or by a surrender of its corporate rights, privileges and franchises, the time begins to run, and at the end of two years therefrom the stockholder is no longer liable for any debt of the corporation. *Hollingshead v. Woodward.* 96

2. In an action seeking to charge defendant as a stockholder of such a corporation with a judgment against it, on the ground that the whole capital stock was not paid in, or a certificate of payment filed as required by the act, the answer set up among other things, in substance, that more than four years before the commencement of the action a judgment was rendered in an action against the corporation sequestering its property, appointing a permanent receiver thereof and restraining its officers and agents from all interference with it; that said corporation has not since transacted any business; that the receiver took possession of the property and has distributed the proceeds among creditors pursuant to order of the court, the

same not being sufficient to pay all of the company debts, and that defendant by reason thereof ceased to be a stockholder from the date of said judgment. On demurrer *held*, that the answer set up a good defense; that by the conceded facts it appeared that when the organization was divested of its rights, privileges, franchises and property by virtue of the appointment of a receiver, it for all practical purposes ceased to exist, and the defendant ceased to be a stockholder within the meaning of the act, and after the expiration of two years he was discharged from all liability. *Id.*

MARRIAGE.

1. Plaintiff's complaint alleged in substance, that A. died seized of certain real estate which he devised to his two sons, J. and F., subject to the limitation as to F. that if he should die without issue his share should go to J. and his heirs; that F. conveyed his interest to defendant, who subsequently induced C., plaintiff's mother, to marry F. by means of the false and fraudulent representations that F. had a fine property so left to him that if he married and had an heir, the land would go to the heir. The complaint further alleged that plaintiff was the only child of such marriage; that the real estate was partitioned between J. and defendant as the grantee of F., and defendant since then has occupied and still occupies and claims to own the part set off to him. The relief asked was that plaintiff be declared the owner of the portion so set off to defendant and be placed in possession thereof. On demurrer to the complaint, *held*, that it set forth a good equitable cause of action and the demurrer was properly overruled; that defendant was bound by his representations and must be considered as holding the property as trustee *ex maleficio*; and so should be held to make good the thing to plaintiff, who would have had the property had the representations been true; that it was immaterial that plaintiff was not

living at the time the representations were made as they were made in her favor and enure to her benefit; and that the question was not affected by the fact that plaintiff's mother was induced to agree to the marriage by purely mercenary considerations. *Piper v. Hoard*. 78

2. The law of marriage, as administered by courts, so far as property interests are concerned, is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance. *Id.*

3. The distinction between the legal and equitable rules applicable to contracts and negotiations in reference to marriage, and those as to other matters pointed out. *Id.*

4. Where a judgment by default was rendered, adjudging a marriage null and void, and a motion to open the default was denied, *held*, that defendant was not precluded by the judgment and order denying the motion from maintaining an action to set aside the judgment on the ground of fraud. *Blank v. Blank*. 91

5. In such an action the fraud alleged was that plaintiff was induced by false representations on the part of defendant, who was a lawyer, to the effect that the marriage was void under the laws of New York, to refrain from consulting counsel and defending the action to annul the marriage. The complaint in that action set forth facts sufficient to justify the court in annulling the marriage on the ground of fraud practiced by the defendant therein. Neither in the complaint in the action to set aside the judgment nor by any proof or offer of evidence on the trial did the plaintiff attempt to controvert such facts, to deny that she was guilty of the fraud charged, or to show that she had any defense upon the facts in the former action. *Held*, that without regard to the question as to whether the marriage was lawful or unlawful as matter of law, or as to whether the representations of defendant in regard

thereto were truthful or not, the complaint was properly dismissed, as it did not appear even if he was wrong in his statement of the case that plaintiff was thereby deprived of any defense in the former action. *Id.*

See ANTE-NUPTIAL AGREEMENT.

MARRIED WOMEN.

1. Defendant M., a married woman, executed to defendant D. a deed of her interest in certain real estate, which deed she delivered to her husband to be delivered to D. to enable him to borrow money thereon to pay taxes on certain real estate belonging to the husband, amounting to \$700. The deed was in fact delivered to D. by the husband as security for the payment of other incumbrances upon the property of the latter as well as the taxes. The amount advanced by D. for the taxes was fully reimbursed to him. *Held*, that as D. knew when he accepted the deed that it was put into the hands of the husband to be delivered, not as an absolute conveyance, but as collateral security for some liability of the husband which the wife contracted to guarantee, it was his duty to ascertain what that liability was, and he could not change the conditions imposed by the grantor, or add to them others agreed upon between him and the husband, as the latter had no apparent authority except that of special agent, and so his power was limited by the instructions of his principal. *Gilbert v. Deshon*. 824

2. In such case the rule that an agent having apparent ownership or authority conferred by the act of his principal, and dealing with an innocent third person, shall be deemed, as against the principal, to be the owner or to have the apparent authority, has no application. *Id.*

MASTER AND SERVANT.

1. In the performance of the duty, imposed by maritime law upon the

owners of a vessel, of rendering such care and medical aid to seamen employed thereon as circumstances will admit, the master stands as the agent and representative of the owners, and his negligence is theirs. *Scarff v. Metcalf*.

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2. A mate, although an officer, is a seaman; and while both he and the master are fellow servants of the owner, they are not such in respect to the owner's duty to the seamen which the master performs. *Id.*

8. In an action against the owners, therefore, for neglect of the master in the performance of such duty, it is not a defense that the neglect was that of a fellow servant. *Id.*

4. Where there is a charter of a vessel the general owner still is responsible to the seamen for the performance of said duty, unless there has been an actual demise of the vessel, such as to take from the owners all possession, authority and control. *Id.*

5. The duty owing by a master to his servant to furnish, with reasonable care, proper and adequate machinery or other appliances for his work, may not be evaded by a delegation thereof to another. Whoever does an act required by the rule, by appointment or permission of the master, represents him, and the act is his act. *Bushby v. N. Y., L. E. and W. R. R. Co.*

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6. Defendant delivered to one L. at a station on its road, a platform car with knowledge that it was to be used in the transportation of lumber over its road. Upon the sides of the platform of the car were iron sockets for stakes or standards, which were necessary in order to load the car. Stakes were not furnished, it being the practice of defendant to furnish lumber cars without stakes, which were supplied by the shippers. L. put a stake in each of the sockets and loaded the car with lumber under the direction of defendant's station agent. The car was attached to a freight train, upon

which plaintiff was employed as a brakeman. In going around a curve, at a high rate of speed, one of the stakes broke, the lumber and plaintiff, who was upon it at the time in the discharge of his duty, were thrown off, and plaintiff was injured. In an action to recover damages for the injury, it appeared that the stake was made of soft, poor wood, and was decayed, spongy and unsound, which was apparent on inspection. It did not appear that defendant had made any rules or directions as to the inspection of such cars, and the station agent had simply general directions to see that everything was in order and to correct anything he saw out of the way; if the conductor or brakeman saw a defect they were to report it to the station agent. *Held*, that the stakes were necessary appliances forming part of the car, and defendant was chargeable with negligence in failing to exercise proper care that suitable and proper ones were furnished; also, that defendant's practice or custom was no defense, as it merely showed it had chosen to delegate to shippers a duty it should have performed itself; and that, therefore, defendant was liable. *Id.*

7. Upon breach by an employer of a contract of employment, by a discharge of the employee before the expiration of his term of service, the latter is only bound to use reasonable diligence to procure other employment of the same kind in order to relieve the employer as much as possible from loss consequent upon the breach; he is not bound to look for or accept occupation of another kind. *Fuchs v. Koerner*.

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8. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the following facts appeared. Plaintiff was a brakeman in defendant's employ, and was on duty at its depot in New York. An engine was moving down to take a car loaded with ashes standing on one of the tracks; plaintiff went to the rear of the car to get upon it for the purpose of attending to

the brake, while a car-coupler took his position at the front of the car to couple it to the engine. The car had no step to get upon it; plaintiff was obliged to take hold of the brake-rod and put his foot on one of the bumpers; the engine came down so rapidly that the car-coupler could not make the coupling. The force of the collision threw plaintiff from the car; he was pushed along by the brake-beam for about two hundred feet, and then the car passed over him causing the injury complained of. Plaintiff's evidence tended to show that the brake of the ash car was out of order so that it could not hold the car, of which defect defendant had notice; that it was customary, when cars were standing on a track, to have their brakes set for the purpose, among others, of preventing their being moved far, if struck in making up trains, collision from such a cause being of frequent occurrence; that if the brakes of this car had been in proper condition and set tight, the car would not have been moved by such a collision more than five or ten feet. Plaintiff was nonsuited. *Held* (EARL and FINCH, JJ., dissenting), that conceding plaintiff was knocked off the car through the negligence of his co-employees, and was so placed in a dangerous position, yet that, under the circumstances, it might have been found, he could have extricated himself without injury, if the brakes had been in proper condition, and that the defect was the proximate cause of the injury; that, therefore, the question should have been submitted to the jury and the nonsuit was error. *Lilly v. N. Y. C. & H. R. R. Co.* 566

9. Defendant proved that it was the duty of all employees, when the brakes of a car standing on a track were out of order so that they could not be set, to "chock" the wheels, and claimed that the omission to do so in this case was negligence of a co-employee contributing to the injury. *Held*, untenable; that the failure to have the brakes in order could, under the circumstances, be fairly alleged as the cause of the injury. *Id*

MEASURE OF DAMAGES.

At an auction sale by defendant of the furniture, etc., of a hotel, made on the premises, plaintiff purchased various articles on separate bids. It was announced by the auctioneer at the opening of the sale that the goods must be removed before the first of May, as the lease expired on that day. A bill of items was delivered to plaintiff, in which there was an overcharge as to one of the articles. This mistake was called to the attention of the auctioneer and plaintiff offered to pay the true amount, but the mistake was not corrected until May second, when plaintiff paid the bill to the auctioneer who paid the money over to defendant, but on calling at the hotel plaintiff was unable to obtain the goods. In an action to recover their value *held*, that the terms of sale did not relieve defendant from the obligation to deliver, except on the contingency that the purchaser failed to complete the purchase before May first; that plaintiff was excused from making payment before that time, the delay having been occasioned by the neglect and default of the defendant in making the correction in the bill; that as the sale, although comprising distinct articles, purchased on separate bids, was treated by the parties as one transaction, plaintiff could not be held to have been in default as to any portion; that, therefore, plaintiff was entitled to recover; and that his measure of damages was the value of the goods on May second. *Gray v. Walton.* 254

MORTGAGE.

1. In an action brought to procure the cancellation and discharge of a mortgage, on the ground that it had been procured by duress, the trial court found that the execution of the mortgage was procured by defendants by threats and menaces, to the effect that unless the mortgagor gave it they would cause her son to be sent to state prison for larceny and embezzlement, for which he was under

arrest and indictment on their complaint, they stating if their terms were complied with they would release the prisoner, if in their power, but if not complied with he would be sent to state prison; that she executed the mortgage while under fear, terror, coercion and duress created by the threats, and that the prisoner was immediately thereafter discharged on his own recognizance. *Held*, that the findings were sufficient to sustain a judgment for the relief sought. *Schoener v. Lissauer*. 111

2. D., for the purpose of making a provision for F., a daughter, and two grandchildren, conveyed to her certain premises, she executing to him a mortgage thereon, which stated that it was given as security, among other things, for the payment to him or to the general guardian of plaintiff, one of the granddaughters of D., of the sum of \$50 annually for the benefit of plaintiff until she should arrive at the age of fifteen, and thereafter the further sum of \$100 until she should arrive at the age of twenty-one. The deed and mortgage were recorded. Thereafter D., at the request of F., and without consideration, executed a certificate of satisfaction of the mortgage which was recorded, and a memorandum was made in the margin of the record of the mortgage to the effect that it was discharged of record. Subsequently the premises were conveyed by F. for a full and valuable consideration, the grantee having no actual notice of the execution of the mortgage. In an action to foreclose the mortgage, *held*, that a valid and irrevocable trust was created thereby, and as the same had in no way been renounced by the *cestui que trust*, the discharge was in contravention of the trust and was, therefore void. *McPherson v. Rollins*. 816

- 8 Also, *held*, that the grantees were chargeable with notice that plaintiff had a beneficial interest under the mortgage, and that the satisfaction thereof was an act not in the execution of the trust and was beyond the power of the trustee. *Id.*

4. The defense of want of consideration is available against an assignee of a mortgage, although he is a *bona fide* purchaser; he stands in respect to the security in the place of the assignor. *Briggs v. Langford*. 680

5. A mortgage upon real estate in the city of Brooklyn contained a provision requiring the mortgagor to pay all taxes, charges and assessments on the premises, and in default thereof the mortgagee was authorized to pay the same "with any expenses attending," and any amount so paid was made a lien upon the premises. In an action to foreclose the mortgage it appeared that there were numerous taxes and assessments charged upon the premises which the mortgagor did not pay, some of which were illegal; that the mortgagee employed an expert to investigate and determine what were legal and to see that proper deductions were made for the illegal charges, agreeing to pay him twenty-five per cent of the amount he might succeed in having deducted. The mortgagee paid the legal liens and the percentage so agreed upon. *Held*, that the latter was a proper item of expense, and when paid became a lien upon the mortgage premises; and that a tender which did not include such item was insufficient. *Eq. L. As. Soc. v. Von Glahn*. 687

— Mortgage made by railroad corporation, validity of.
See Day v. O. & L. C. R. R. Co. 129

See CHATTEL MORTGAGE.
FORECLOSURE.

MOTIONS AND ORDERS.

1. A motion for a new trial in a criminal action, on the ground of newly discovered evidence, can only be granted where the motion is made before judgment. (Code of Crim. Pro., §§ 463, 466.) *People v. Bradner*. 1
2. To give this court jurisdiction to review a decision of the General Term, reversing a judgment and

granting a new trial in an action tried by a jury, the General Term order must show the facts conferring the jurisdiction. It is sufficient to render a consideration of the appeal impossible that the General Term may have reversed upon a question of fact. *Pharis v. Gere.* 231

3. The record on appeal from such an order contained a recital, immediately following the statement of rendition of the verdict, that "the court thereupon denied the motion of the defendant for a new trial upon the minutes." Following this was a formal order stating the making of a motion for a new trial on the minutes, and that "said motion be and the same is hereby denied." Then followed an order of the General Term, which recited an appeal from the order denying the motion for a new trial, and from judgment, and reversed both the order and the judgment and granted a new trial. The case also disclosed that there were disputed questions of fact. On appeal from the General Term order, *held*, that said court had jurisdiction of the questions of fact, and it was to be assumed that its order was based upon some one of the grounds mentioned in the provision of the Code of Civil Procedure (§ 999), in reference to motions for new trial on the minutes, and as it could not be said that the reversal was not upon a question of fact, the order was not reviewable here. *Id.*

4. *It seems*, an order denying a motion for a new trial made on the minutes should state the grounds on which the motion was made. If it does not the General Term may affirm or refuse to hear an appeal therefrom until the order is corrected by stating the question passed upon by the trial court. *Id.*

5. A transcript of a Justice's Court judgment for \$810.69 was filed in the county clerk's office. After the expiration of five years a motion was made by plaintiff in the County Court for leave to issue execution. On the hearing of the motion defendant did not appear,

but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment, under and by virtue of an assignment executed by plaintiff's general agent. The matter was referred to a referee, who reported that plaintiff made an agreement in writing to sell the judgment, and that there was no fraud inducing it. The court, on hearing counsel for plaintiff and the contestant, the defendant not appearing, confirmed the report, denied plaintiff's motion, with costs to the contestant. *Held*, that it was a special proceeding within the meaning of the Code of Civil Procedure (§ 1357), and that the order was appealable to the Supreme Court. *Ithaca Agricultural Works v. Eggleston.* 273

6. An order of General Term reversing an order made on trial which denied a motion to amend the complaint, and granting the amendment, when the amendment does not virtually change the plaintiff's claim, is in the discretion of the court and is not reviewable here. (Code, § 723.) *King v. Barnes.* 645

7. The judgment of the General Term herein ordered that certain shares of stock should be delivered by one of the defendants, who held them as depository or custodian, to a referee appointed by the judgment. On appeal by defendants to this court they gave the security required to perfect the appeal. (Code, § 1826.) They then moved that the custodian be required to deliver the stock to the referee, which was granted, and the stock was so delivered. On motion of certain of the defendants, plaintiffs proceedings on the judgment were stayed until the hearing and decision of said appeal; that order was reversed by the General Term. *Held*, that the General Term order was not reviewable here; that if the proceedings were in fact stayed by the Code (§ 1828), the appellants were not entitled as a matter of right to an order, but it was in the discretion of the court, and its determination was not reviewable here. *Id.*

MUNICIPAL CORPORATIONS.

See BROOKLYN (CITY OF).
 BUFFALO (CITY OF).
 NEW YORK (CITY OF).

NAVIGATION.

1. By virtue of the Nichol's patent of 1686 and the Dongan patent of 1686 and the confirmation thereof by the Colonial government, the town of Brookhaven was vested with title to the lands under the waters of the bays and harbors included within the boundaries of the patents, as well as to the uplands not already the subject of private ownership. *Roe v. Strong.*

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2. The title to the lands under water vested in the town, subject to the public right of navigation, and it seems the town may not alienate the title so acquired to the material prejudice of the common right.

Id.

NEGLIGENCE.

1. In the performance of the duty, imposed by maritime law upon the owners of a vessel, of rendering such care and medical aid to seamen employed thereon as circumstances will admit, the master stands as the agent and representative of the owners, and his negligence is theirs. *Scarff v. Metcalf.*

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2. A mate, although an officer, is a seaman; and while both he and the master are fellow servants of the owner, they are not such in respect to the owner's duty to the seaman which the master performs.

Id.

3. In an action against the owners, therefore, for neglect of the master in the performance of such duty, it is not a defense that the neglect was that of a fellow servant. *Id.*

4. Where there is a charter of a vessel the general owner still is responsible to the seamen for the performance of said duty, unless

there has been an actual demise of the vessel, such as to take from the owners all possession, authority and control. *Id.*

5. Where, therefore, a vessel was sailed by the master, one of several joint-owners thereof, under an arrangement that he should sail it on shares, pay for victualing manning, and furnishing supplies, the other owners having nothing to do therewith; *held*, that this was not an actual demise, and that all the joint owners were liable to the mate of the vessel for damages sustained by reason of the neglect of the master to furnish and render to him necessary medical attendance and care. *Id.*

6. Under and by the provisions of the acts under which the New York and Brooklyn Bridge was constructed (Chap. 899, Laws of 1867; Chap. 601, Laws of 1874; Chap. 800, Laws of 1875), the bridge belongs to the two cities of New York and Brooklyn, the trustees thereof are their agents, and those employed by the trustees are the agents and servants of the cities, for whose careless and negligent acts in performing the duties of their employment the cities are liable. *Walsh v. Mayor, etc.*

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7. As to whether, in the absence of a statutory requirement, a steamship company owes a duty to its passengers to provide a surgeon to care for them in case of sickness or accident, or as to whether having voluntarily assumed that duty its position becomes identical with that of a carrier upon whom the duty is imposed by law, *quære.* *Laubheim v. De K. N. S. M.*

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8. Where by law or by choice the company has become bound to furnish such an officer, reasonable care and diligence in the selection of a person reasonably competent is all that is required, and it is liable only for a neglect of that duty. It is not compelled to select and employ the highest skill and longest experience. *Id.*

9. Accordingly *held*, that in the

absence of evidence of any carelessness or negligence on the part of a steamship company in its selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon

Id.

10. Defendant's road passes east and west through the city of B. with two tracks; the south track being used for eastward bound trains and the north for those going west; the space between the tracks is about seven feet. Plaintiff who was perfectly familiar with the location and the use ordinarily made of the two tracks, was walking, in the day time, very rapidly north along the center of a highway running north and south, intersecting the railroad. A freight train headed east was standing on the south track; the train was divided at the crossing, leaving a space of about twenty feet for passage on the street. Plaintiff passed through this open space, and just as he stepped upon the north track, was struck by an engine going west thereon and was injured. In an action to recover damages for the injury, it appeared that when plaintiff reached the middle of the space between the two tracks he could have seen a train approaching from the east within a half mile of the crossing. Instead of looking in that direction he looked to the west and stepped immediately in front of the engine. *Held*, that plaintiff was guilty of contributory negligence; that the moment he crossed the south track it was his duty to look to the east, from which direction he had reason to believe any train on the north track would approach the crossing, and his omission to do so was a bar to a recovery. *Young v. N. Y., L. E. & W. R. R. Co.*

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11. It appeared that a brakeman of the freight train was standing in the space between the cars, to recouple them when he should be signalled so to do. It did not appear that plaintiff knew the person was a brakeman, or supposed he was there to warn travelers, or that he owed him any duty what-

ever, or that plaintiff in any way relied upon the brakeman for protection, or was lulled into security by the absence of any warning. *Held*, the fact that the brakeman gave no warning did not relieve plaintiff from the charge of negligence. *Id.*

12. In an action to recover damages for injuries alleged to have been caused by defendant's negligence, the following facts appeared: Plaintiff was a brakeman in defendant's employ, and was on duty at its depot in New York. An engine was moving down to take a car loaded with ashes standing on one of the tracks; plaintiff went to the rear of the car to get upon it for the purpose of attending to the brake, while a car-coupler took his position at the front of the car to couple it to the engine. The car had no step to get upon it; plaintiff was obliged to take hold of the brake-rod and put his foot on one of the bumpers; the engine came down so rapidly that the car-coupler could not make the coupling. The force of the collision threw plaintiff from the car; he was pushed along by the brake-beam for about two hundred feet, and then the car passed over him, causing the injury complained of. Plaintiff's evidence tended to show that the brake of the ash car was out of order so that it could not hold the car, of which defect defendant had notice; that it was customary, when cars were standing on a track, to have their brakes set for the purpose, among others, of preventing their being moved far, if struck in making up trains, collision from such a cause being of frequent occurrence; that if the brakes of this car had been in proper condition and set tight, the car would not have been moved by such a collision more than five or ten feet. Plaintiff was nonsuited. *Held* (EARL and FRENCH, JJ., dissenting), that conceding plaintiff was knocked off the car through the negligence of his co-employees, and was so placed in a dangerous position, yet that, under the circumstances, it might have been found, he could have extricated himself without injury, if

the brakes had been in proper condition, and that the defect was the proximate cause of the injury; that, therefore, the question should have been submitted to the jury, and the nonsuit was error. *Lilly v. N. Y. C., etc.* 566

18. Also, *held* (EARL and FINCH, JJ., dissenting), that an accident of this nature might fairly and reasonably be apprehended as a possible result of a failure on the part of defendant to keep the brakes in good condition; that the fact that no such accident had ever before happened was not conclusive in this respect, as it was not necessary to see in advance all the possibilities of danger which might result from such an omission, or to show that an exact counterpart of the accident had happened before. *Id.*

14. Defendant proved that it was the duty of all employes, when the brakes of a car standing on a track were out of order so that they could not be set, to "chock" the wheels, and claimed that the omission to do so in this case was negligence of a co-employee contributing to the injury. *Held*, untenable; that the failure to have the brakes in order could, under the circumstances, be fairly alleged as the cause of the injury. *Id.*

15. In an action to recover damages for personal injuries caused by defendant's negligence, where no evidence is given as to the circumstances and condition in life of the plaintiff, his earning power, skill and capacity, no damages for future pecuniary loss can be awarded. *Staal v. Grand St. etc., R. R. Co.* 625

NEW TRIAL.

A motion for a new trial in a criminal action, on the ground of newly discovered evidence, can only be granted where the motion is made before judgment. (Code of Crim. Pro., §§ 463, 466.) *People v. Bradner.* 1

NEW YORK (CITY OF).

1. Under and by the provisions of the acts under which the New York and Brooklyn Bridge was constructed (Chap. 899, Laws of 1867; Chap. 601, Laws of 1874; Chap. 800, Laws of 1875), the bridge belongs to the two cities of New York and Brooklyn, the trustees thereof are their agents, and those employed by the trustees are the agents and servants of the cities, for whose careless and negligent acts in performing the duties of their employment the cities are liable. *Walsh v. Mayor, etc.* 220

2. *It seems* that under the provision of the New York Consolidation Act (§§ 219, 220, Chap. 410, Laws of 1882), the public administrator has no right of administration upon the estate of one dying intestate, without the state, leaving effects within the county of New York, who was not a citizen of the state. *In re Page.* 266

8. Under the provisions of the Revised Statutes, however (2 R. S. 74, § 27), which in this respect have not been repealed by the Code of Civil Procedure, the public administrator has a right of administration contingent upon the refusal of others who have a prior right. *Id.*

— *As to underground street railways in.*

See In re N. Y. D. R. R. Co. 42

NOTICE.

— *When purchaser of premises on which is a mortgage to a trustee on record is chargeable with notice that a satisfaction of mortgage by the trustee was without authority and void.*

See McPherson v. Rollins. 817

— *Where county treasurer was authorized to borrow money and issue its obligation therefor, in an action against county on notes for money loaned purporting to have been given pursuant to such authority, held, the presumption in the absence of proof to the contrary was that the money was*

borrowed as authorized and applied to the uses of the county, and the fact that the county treasurer had fraudulently overissued notes to a large amount was no defense; also, the fact that plaintiff was a member of the board of supervisors did not charge them with notice of the wrongs perpetrated by the county treasurer.

See Clark v. Bd. of Supervisors. 553

— *Where vendor notifies vendee that he will not fulfill contract of sale of goods, the vendee is not required to make any demand or serve notice to deliver before suit for breach of contract.*

See Robinson v. Frank (Mem.). 655

NUISANCE.

1. A tradesman may convey goods from a street to his adjoining store, and from the store to the street, and for that purpose may temporarily obstruct passage on the sidewalk. But such an obstruction must not only be necessary, with reference to the business of the tradesman, it must be reasonable with reference to the rights of the public. *Callanan v. Gilman. 860*

- 2 Defendant, a wholesale and retail grocer, having a store on a street in the city of New York, was in the habit of taking goods to and from his store by means of trucks. When loading or unloading a bridge was placed across the sidewalk, entirely obstructing it; and elevated above it at the inner end about twelve inches, at the outer about twenty. Persons passing when the bridge was in place were obliged to step upon the stoop of defendant's store and go around the end of the bridge which rested thereon. The bridge was usually removed when not in use, but it was sometimes left in position for ten or fifteen minutes, and when in use it sometimes remained in position from one to two hours, and on an average the sidewalk was thus obstructed from four to five hours of each business day between 9 A. M. and 5 P. M. *Held*, that such an extensive and continuous use of

the sidewalk was not reasonable, and constituted a nuisance. *Id.*

3. In an action to restrain the continuance of the nuisance, the complaint set forth the facts above stated, and also alleged, in substance, that plaintiffs were engaged in the same business and occupied the store adjoining defendant's; that a large portion of plaintiffs' customers, in order to reach their store, were obliged to pass in front of defendant's store; that the said obstruction prevented plaintiffs, their employes and patrons, from passing along the sidewalk to and from plaintiffs' store, to the great detriment and injury of plaintiffs and their said business. *Held*, that there were sufficient averments of special damage to warrant proof of such damage, and upon such proof being made, to sustain a judgment granting the relief sought; that if the complaint was not sufficiently definite in its statements as to such damages, defendant should have moved to make it more definite, or for a bill of particulars; and having taking issue and gone to trial, it was too late to object. *Id.*
4. There was proof that some custom was turned from plaintiffs' store on account of the obstruction. *Held*, that this, with the other facts stated, justified a judgment in their favor; also, that defendant could not justify the unreasonable obstruction by proof that he permitted pedestrians to pass around over his elevated stoop or through his store. *Id.*
5. The judgment restrained defendant, his agents, etc., from obstructing the sidewalk in front of his store "by any plank-way or bridge, or other like obstruction elevated above the sidewalk, or from hindering plaintiffs, their employes and customers from the free and unobstructed use of the sidewalk." *Held*, that the judgment was too broad. Ordered, therefore, that it be modified so as to require the defendant to "refrain from unnecessarily and unreasonably obstructing" the sidewalk. *Id.*

OFFICE AND OFFICER.

Where, pursuant to an order of the court, surplus money arising on foreclosure sale of land belonging to an intestate's estate was paid over to a surrogate, and was by him deposited in good faith with a private banker in good standing and credit, doing a general banking business, pending proceedings to determine the parties entitled thereto, and before the termination of such proceedings the banker failed and his estate proved to be largely insolvent. *Held*, it appearing there was no negligence on the part of the surrogate, that the sureties on his official bond were not liable for the loss. *People ex rel. v. Faulkner*. 477

See COUNTY TREASURER.
SUPERVISORS.

ORDERS (OF COURT).

See MOTIONS AND ORDERS.

ORDERS (FOR MONEY,
GOODS, ETC.).

1. Where one delivers to another an order on a third person to pay a specified sum to the payee, the natural import of the transaction is that the drawee is indebted to the drawer and the latter is indebted to the payee in the sum specified, and that it was given to the payee as the means of paying or securing the payment of his debt. *Manchester v. Braedner*. 346
2. Such an order, therefore, in the absence of evidence showing a different relation between the drawer and payee is an acknowledgment in writing by the former of a debt within the statute of limitations (Code Pro., § 110; Code Civ. Pro., § 395), and continues the debt for a period of six years from its date. *Id.*
3. Such an order does not import that the debt so acknowledged is

only to be paid out of the fund against which it is drawn. *Id.*

PARTIES.

1. Where, under grant made by the trustees of the town of Brookhaven, an individual erected a wharf and a bridge over the water of the bay. *Held*, that if the grant was unlawful and the construction an unlawful obstruction of navigation, the wrong could not be redressed by action brought by an individual who had suffered no special injury; that plaintiffs in such an action had no standing unless they established that the title of the town had been divested and had been acquired by them. *Roe v. Strong*. 850
2. S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the testator's wife during her life; after her death the rent and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint." The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted "from the sum bequeathed to such daughter in this section." The will also empowered the executors "for the purpose of carrying into effect" the will and the trusts therein created, to sell "in their discretion" any and all of the real estate. In an action for partition of certain real estate of an interest in which the testator died, seized, and which was in-

cluded in said residuary clause, *held*, that an infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (§ 1538); that she never could take the real estate, and had no title thereto or interest therein as realty, but that the whole title vested in the executors and trustees; that, construing all the provisions of the will together, the direction to sell the real estate was imperative and there was, therefore, an equitable conversion thereof into personality. *Delafield v. Barlow*. 535

3. Where an action for partition is commenced by one who is, under the Code of Civil Procedure (§ 1538), a proper party in the action, but is not "a joint tenant or tenant in common" and so, not entitled to be a plaintiff in the action, the defect is not jurisdictional, and a decree directing a sale, if erroneous, is not absolutely void; if, therefore, no appeal is taken, the judgment is conclusive upon the parties. *Reed v. Reed*. 545

4. Where, upon hearing on *habeas corpus* before a justice of the Supreme Court, the relator was remanded to custody, and the General Term, on *certiorari*, directed to said justice as such, reversed the order and directed the discharge of the prisoner. *Held*, that said justice was not the proper person to take an appeal to this court; that the decision affected no substantial right of his within the meaning of the Code of Criminal Procedure (§ 519), or of any person of whom he was the legal representative or agent. *People ex rel. v. Lawrence*. 607

5. *It seems* the appeal in such case should be taken "in the name of the People" by the attorney general or the district attorney. (Code of Civ. Pro., § 2059.) *Id.*

6. Where one who ought to have been, but was not, joined as a party plaintiff in an action dies before the trial, and the plaintiffs named fully own and represent the cause of action, the fact of such death may be proved in reply to a plea in

abatement, setting up the non-joinder. *Groot v. Agens*. 633

PARTITION.

1. S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the use of the testator's wife during her life; after her death the rents and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint." The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted "from the sum bequeathed to such daughter in this section." The will also empowered the executors "for the purpose of carrying into effect" the will and the trusts therein created, to sell "in their discretion" any and all of the real estate. In an action for partition of certain real estate of an interest in which the testator died, seized, and which was included in said residuary clause, *held*, that an infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (§ 1538); that she never could take the real estate, and had no title thereto or interest therein as realty, but that the whole title vested in the executors and trustees. *Delafield v. Barlow*. 535

2. Where an action for partition is commenced by one who is, under the Code of Civil Procedure (§ 1538), a proper party in the action,

but is not "a joint tenant or tenant in common" and so, not entitled to be a plaintiff in the action, the defect is not jurisdictional, and a decree directing a sale, if erroneous, is not absolutely void; if, therefore, no appeal is taken, the judgment is conclusive upon the parties. *Reed v. Reed.* 545

3. Accordingly, *held*, that the defect was no objection to the title offered a purchaser on such a sale, and that his motion to be relieved from the sale was properly denied. *Id.*

PARTNERSHIP.

1. An incoming partner can only be made liable by agreement for the prior debts of the firm, whether he succeeds an outgoing partner by purchase, or whether, upon the death of one partner he joins with the survivors in carrying on the business. *Servais v. McDonnell.* 260
2. An undertaking on his part, alone or in connection with others, that the new firm will pay the debts of the old firm, can be enforced only by the old firm; its creditors may not sue for a breach of it. *Id.*
3. Plaintiff was the owner of certain promissory notes, executed by the individual members of a firm, for a firm debt. One of the makers having died, a new firm was formed to continue the business, composed of the surviving members of the old firm and the widow and a son of the decedent. By the new articles of copartnership it was declared that the widow and son were to have a third interest and were to pay "one-third of the liabilities of the late firm." In an action to recover the amount of the notes, in which the widow alone defended, *held*, that if the action was maintainable at all against her, it was only for one-third of the amount. *Id.*
4. *It seems* that as plaintiff's contract was with the members of the old firm, in the absence of evidence that there had been a change of credit or a promise on plaintiff's part to accept the incoming mem-

bers as his debtors, or some analogous act, no recovery could be had against them; that the obligation of the contract did not enure to plaintiff's benefit. *Id.*

5. In January, 1873, defendant M. and one E. formed a copartnership under the firm name of M. & E., the profits of the business to be divided equally. It was agreed between E. and one F. that the latter should receive E.'s share of the profits with certain exceptions. This agreement was assented to by M. upon condition that it should in no respect conflict with or affect the rights secured by the copartnership articles. After the expiration of the term of the copartnership E.'s connection with the business ceased and it was carried on by M. individually, but in the firm name, he retaining and using as his own the firm assets; he subsequently made an assignment to C. for the benefit of creditors. Plaintiff commenced an action against M. and F. as joint debtors, the summons in which was served upon F. Judgment was recovered and execution issued against their joint property and the individual property of F. On its return *nulla bona* this action was brought by plaintiff as such judgment-creditor against M. and C. to set aside the assignment. The court found that F. knew of the intended assignment and ratified it. *Held*, that the complaint was properly dismissed; that the agreement between E. and F. did not make the latter a member of the firm or give him any interest in the firm business which could be reached by a creditor of his until after the firm debts had been satisfied. *Rockafellow v. Miller.* 507
6. *It seems* an agreement by a third person with an out-going member of a firm to relieve him from and indemnify him against the firm debts, where no consideration passed to the promisor, cannot be enforced against him by a creditor of the firm. *Berry v. Brown.* 659
7. *It seems*, also, such an oral agreement is void under the statute of frauds. *Id.*

— *When future profits proper to be considered on question of damages for breach of partnership agreement. See Dart v. Laimbeer (Mem.).* 684

PATENTS (FOR LAND).

1. *It seems* the presumption is, that the title of a person in possession of upland adjoining Setauket bay, in the town of Brookhaven, Long Island, before the Nichol's patent to that town of 1666, extended to high-water mark. *Roe v. Strong.* 350
2. As to a possession originated after said patent and a title derived under it, *it seems* the cliff is the boundary on the waterside, leaving a strip of land along the shore above high-water mark, which was reserved for common use. *Id.*
3. By virtue of said patent and the Dongan patent of 1686 and the confirmation thereof by the colonial government, the said town was vested with title to the lands under the waters of the bays and harbors included within the boundaries of the patents, as well as to the uplands not already the subject of private ownership. *Id.*
4. The title to the lands under water vested in the town, subject to the public right of navigation, and *it seems* the town may not alienate the title so acquired to the material prejudice of the common right. *Id.*

PAYMENT.

1. A party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal. *Hayes v. Nourae.* 577
2. While an obligation due an infant may, with or without express words authorizing it, be dis-

charged by payment to the guardian of the infant, it is with the qualification that the guardian is authorized to receive payment. *Wuesthoff v. Germania Life Ins. Co.* 580

3. *It seems*, that a payment by a debtor in this state to a foreign guardian will be good, if the guardian, by the law of the state from which he derives his appointment, is authorized to receive it. *Id.*

PENAL CODE.

§§ 68, 69, 78, 79. *People v. Sharp.* 427

PERJURY.

The indictment herein charged defendant with perjury in verifying a quarterly report made by a state bank, of which he was cashier, to the banking department. The verifying affidavit was set forth in the indictment, which charged that defendant, at the time of making the affidavit, had full knowledge of the real and true condition of the bank and of the matters stated in the report, and that he well knew, when he swore to the affidavit, that the report and accompanying schedules were false and untrue, but wickedly and corruptly swore that they were true to the best of his knowledge and belief. The indictment then set forth specifically several statements contained in the report, in respect to each of which it averred that defendant well knew, at the time he swore to the report, that said statement was not true according to the best of his knowledge and belief, and that the fact was otherwise than as stated, specifying the difference. It was objected that the indictment was defective, in that it did not directly allege that the statements in the report were, as matter of fact, untrue. *Held*, untenable; that the averments in the indictment amounted to an allegation that the statements were false. *People v. Clements.* 205

PERSONAL PROPERTY.

1. The liability of personal property situated in this state, but belonging to a non-resident, to be attached and sold under legal process is to be determined by the law of the state, not that of the jurisdiction where the owner lives. *Keller v. Paine.* 88

2. The general rule that the voluntary transfer of personal property, wheresoever situated, is to be governed by the law of the owner's domicil, always yields where the law and policy of the state where the property is actually located have provided a different rule of transfer from that of the state where the owner lives. *Id.*

See EQUITABLE CONVERSION.

PLEADING.

1. Where an executory contract for the sale of goods contains no provision as to the time when delivery is to be made by the vendor, its legal effect is an agreement to deliver within a reasonable time, and in an action brought by him against the purchaser for failure of the latter to perform, where by the terms of the contract payment is to be made upon delivery, plaintiff must allege in his complaint and prove upon the trial performance or offer to perform on his part within a reasonable time. *Pope v. T. H. O. & Mfg. Co.* 61

2. Where the complaint in such an action omitted to allege a tender of the goods in a reasonable time, and upon motion to dismiss the complaint because of the omission, plaintiffs did not offer to amend and no amendment was made at any stage of the trial or proof given showing that the tender was in a reasonable time. *Held*, that the denial of the motion was error, requiring a reversal. *Id.*

3. Also, *held*, the defect in the complaint was not waived by the failure to take the objection by demurrer or answer. (Code of Civil Pro. § 499.) *Id.*

4. The indictment herein charged defendant with perjury in verifying a quarterly report made by a State bank, of which he was cashier, to the banking department. The verifying affidavit was set forth in the indictment, which charged that defendant, at the time of making the affidavit, had full knowledge of the real and true condition of the bank and of the matters stated in the report, and that he well knew, when he swore to the affidavit, that the report and accompanying schedules were false and untrue, but wickedly and corruptly swore that they were true to the best of his knowledge and belief. The indictment then set forth specifically several statements contained in the report, in respect to each of which it averred that defendant well knew, at the time he swore to the report, that said statement was not true according to the best of his knowledge and belief, and that the fact was otherwise than as stated, specifying the difference. It was objected that the indictment was defective, in that it did not directly allege that the statements in the report were, as matter of fact, untrue. *Held*, untenable; that the averments in the indictment amounted to an allegation that the statements were false. *People v. Clements.* 205

5. Defendant interposed a general demurrer to the indictment. *Held*, that, conceding it was technically defective in the form of the allegations, the objection could not be raised by demurrer under the Code of Criminal Procedure (§ 323), nor did the defect render the indictment insufficient (§ 285). *Id.*

6. *It seems* that, under the common law system of pleading, such an objection can only be taken advantage of by special demurrer; it is not available on general demurrer or on motion in arrest of judgment. *Id.*

See COUNTER-CLAIM.

POLICE.

1. The act of 1885 (Chap. 499, Laws of 1885), entitled "an act provid-

ing for placing electrical conductors under ground in cities of this state and for commissioners of electrical subways," so far as it affects corporations organized before its passage, is not obnoxious to the constitutional prohibition against laws impairing the obligations of contracts; it does not annul, destroy, or materially impair or restrict any franchises or contract rights previously secured, but seeks to regulate and control their exercise, so that they shall cease to constitute a public nuisance
People ex rel. v. Squire. 593

2. Regulations of the character provided for in said acts are strictly police regulations, such as are within the legitimate authority of the legislature to delegate the exercise thereof to municipal corporations. *Id.*

3. The right to exercise this police power is a governmental function which cannot be alienated, surrendered or abridged by the legislature by any grant, contract or delegation whatsoever. *Id.*

PRACTICE.

1. Under the provision of the Code of Criminal Procedure (§ 528, as amended by Chap. 493, Laws of 1887), vesting in the Court of Appeals jurisdiction to examine the record on appeal in a criminal action "where the judgment is of death," and to determine upon the whole case whether "the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," the defendant is not given and may not claim, as matter of right in this court, the benefit of errors occurring on the trial; the failure to make proper objections and take exceptions deprives them of that right; the court is simply vested with a power in its discretion to disregard the neglect and without regard to exceptions to review the case upon the merits.
People v. Driscoll. 414

2. Where, therefore, evidence was received or rejected without objection, on the trial in such an action, which if proper objections and exceptions had been taken, would have required a reversal, the court is not bound to reverse, and is only authorized to do so in its discretion, where it appears affirmatively from the whole case, that injustice has been done to the accused in the result arrived at by the trial court. *Id.*

3. Under the new practice introduced by the provision of the Code of Civil Procedure (§ 992), forbidding exceptions to findings of fact in actions tried by the court or a referee, and permitting questions of fact to be reviewed by the General Term without exceptions, it is the duty of an appellant desiring a review of questions of fact to see that the case contains a certificate that all the evidence has been included, or all bearing on the questions so sought to be reviewed; in the absence of the certificate the General Term has a right to refuse to review such questions. *Porter v. Smith.* 581

PRACTICE.

— When objection not taken on trial not available here. *Smith v. Rector, etc.* 610

See APPEAL.

CRIMINAL TRIAL.

MOTIONS AND ORDERS.

PLEADING.

TRIAL.

PRESUMPTIONS.

1. In reviewing judgments rendered upon trial before a court or a referee, it is the duty of the appellate court to indulge all reasonable presumptions in support of the judgment and to assume when necessary, that all the evidence in the case was considered, and a conclusion thereon, adverse to the appealing party, reached. *Day v. Town New Lots.* 148

2. Where one delivers to another an order on a third person to pay a specified sum to the payee, the natural import of the transaction is that the drawee is indebted to the drawer and the latter is indebted to the payee in the sum specified, and that it was given to the payee as the means of paying or securing the payment of his debt. *Manchester v. Braedner*. 846

3. *It seems* the presumption is, that the title of a person in possession of upland adjoining Setauket bay, in the town of Brookhaven, Long Island, before the Nichol's patent to that town of 1666, extended to high-water mark. *Ros v. Strong*. 850

4. A title in fee will not be implied from user, where an easement only will secure the privilege enjoyed. *Id.*

5. To authorize an inference of authority in an agent it must be practically indispensable to the execution of the duties really delegated; it is not sufficient that the act of the agent is convenient or advantageous, or more effectual in the transaction of the business provided for. *Bickford v. Menier*. 490

— Where county treasurer was authorized to borrow money for county and issue its obligations therefor, in an action against county upon notes for money loaned purporting to have been given pursuant to such authority, held the presumption in the absence of proof to the contrary was that the money was borrowed, as authorized, and applied to the uses of the county, and the fact that the county treasurer had fraudulently overissued notes to a large amount was no defense, also the fact that plaintiff was a member of the board of supervisors did not charge them with notice of the wrong perpetrated by the county treasurer.

See *Clark v. Board of Supervisors*. 558

PRINCIPAL AND AGENT.

1. Defendant M., a married woman, executed to defendant D. a deed

of her interest in certain real estate, which deed she delivered to her husband to be delivered to D. to enable him to borrow money thereon to pay taxes on certain real estate belonging to the husband, amounting to \$700. The deed was in fact delivered to D. by the husband as security for the payment of other incumbrances upon the property of the latter as well as the taxes. The amount advanced by D. for the taxes was fully reimbursed to him. *Held*, that as D. knew when he accepted the deed that it was put into the hands of the husband to be delivered, not as an absolute conveyance, but as collateral security for some liability of the husband which the wife contracted to guarantee, it was his duty to ascertain what that liability was, and he could not change the conditions imposed by the grantor, or add to them others agreed upon between him and the husband, as the latter had no apparent authority except that of special agent, and so his power was limited by the instructions of his principal. *Gilbert v. Deshon*. 824

2. In such a case the rule that an agent having apparent ownership or authority conferred by the act of his principal, and dealing with an innocent third person, shall be deemed, as against the principal, to be the owner or to have the apparent authority, has no application. *Id.*

3. The rule that a principal is liable for the acts of his agent, within the apparent scope of his authority, only applies where a third person has acted, believing and having a right to believe that the agent was within his authority, and where such person would sustain loss if the act of the agent was not considered that of the principal. *Bickford v. Menier*. 490

4. To authorize an inference of authority in an agent it must be practically indispensable to the execution of the duties really delegated; it is not sufficient that the act of the agent is convenient or advantageous, or more effectual in the

transaction of the business provided for. *Id.*

5. Where defendants, doing business in France, sent an agent to New York city, with authority to receive consignments of goods from his principals, to care for and sell them, and after paying the expenses of the business from the receipts, to remit the balance to them, and where such agent carried on the business so entrusted to him in his own name. *Held*, that no authority in the agent could be implied to borrow money for his principals; and that they were not liable for moneys borrowed by him without their authority, to pay an indebtedness due from him, to them; also that no inference of authority could be drawn from the fact that the agent had been especially authorized to borrow in certain cases. *Id.*

See FACTOR

PROMISSORY NOTES.

See BILLS, NOTES AND CHECKS.

PUBLIC ADMINISTRATOR.

1. A citation was issued by the surrogate of the county of New York to the widow and next of kin of an intestate, notifying them of an intended application by the public administrator for letters of administration. Upon the day and hour named in the citation, the counsel for the widow and next of kin appeared before the surrogate to oppose; but there was no appearance on the part of the public administrator. Said counsel remained in court until after the second call of the calendar, and was then informed by the surrogate that there was no such application on the calendar. No application was made on that day, but subsequently, and without notice to said counsel and in his absence, the application was made and granted. *Held*, that the order was void; that no order having been made on the return day of the citation, either adjourning the hearing or determining the matter, the surrogate lost jurisdiction to proceed further, without either due service of another citation or a voluntary appearance of the widow and next of kin. *In re Page*. 266
2. A motion to revoke the letters was denied by the surrogate, and his order was affirmed by the General Term. *Held*, that as the decisions below showed a fair justification for the conduct of the public administrator, and, as his good faith was not questioned, the taxable costs of the proceedings should be paid out of the estate. *Id.*
3. *It seems* that under the provision of the New York Consolidation Act (§§ 219, 220, chap. 410, Laws of 1882) the public administrator has no right of administration upon the estate of one dying intestate, without the state, leaving effects within the county of New York, who was not a citizen of the state. *Id.*
4. Under the provisions of the Revised Statutes, however (2 R. S. 74, § 27), which, in this respect, have not been repealed by the Code of Civil Procedure, the public administrator has a right of administration, contingent upon the refusal of others who have a prior right. *Id.*
5. The widow and next of kin of a citizen of the United States, but a non-resident of this state, dying intestate out of the state, leaving personal property in said county, are entitled to letters of administration in the order of priority named in the statute. *Id.*
6. It is not necessary, however, that they should initiate the proceedings; the public administrator may and, in case of their neglect, it is his duty to do this, and if after proper service of a citation, upon hearing on his application, it appears there is a widow or relative competent, qualified and willing to take, letters must be issued to such person; if this does not appear the public administrator is

entitled to administration, at least where there are creditors of the decedent in said county. *Id.*

PUBLIC LANDS.

1. By virtue of the Nichols patent of 1666, and the Dongan patent of 1686 and the confirmation thereof by the Colonial government, the town of Brookhaven was vested with title to the lands under the waters of the bays and harbors included within the boundaries of the patents, as well as to the uplands not already the subject of private ownership. *Roe v. Strong.* 350
2. The title to the lands under water vested in the town, subject to the public right of navigation, and it seems the town may not alienate the title so acquired to the material prejudice of the common right. *Id.*

PUBLIC POLICY.

A covenant in restraint of trade is valid if it imposes no restriction upon one party, which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into, and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee. *Hodge v. Sloan.* 244

QUESTIONS OF LAW AND FACT.

— When question of negligence one of fact.
See *Lilly v. N. Y. C. & H. R. R. Co.* 566

RAILROAD CORPORATIONS.

1. The act of 1880 (Chap. 582, Laws of 1880), "providing for excavating and tunnelling * * * for transportation purposes within the villages and cities of this state,"

authorizes and regulates underground street railways. *In re N. Y. Dist. R. Co.* 42

2. A railroad confined within the limits of a city and proposed to be built exclusively under the surface of the street thereof, is a street railway within the meaning of the provision of the state Constitution (art. 8, § 18), declaring that no law shall authorize the construction of a street railroad except upon the condition of the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of the street, or in lieu of the consent of the property holders, in case it cannot be obtained, the determination of commissioners appointed by the court that the road ought to be constructed. *Id.*
3. As applicable to such a road therefore, the provision of said act declaring that the determination of commissioners confirmed by the court "may be taken in lieu of the consent of said authorities" is unconstitutional and invalid. *Id.*
4. The general railroad act of 1850 (Chap. 140, Laws of 1850), has no application to street railroads. *Id.*
5. Conceding it does so apply, the authority was taken away so far as relates to street railroads in the city of New York by the act of 1860. (Chap. 10, Laws of 1860.) *Id.*
6. The [general surface act of 1884 (Chap. 252, Laws of 1884), while permitting such an appointment, is limited wholly to surface roads and so cannot be applied in aid of an underground street railroad. *Id.*
7. Where an order was applied for, under said act of 1880, for the appointment of commissioners, to determine whether an underground street railroad in said city ought to be built without the consent of the municipal authorities or the owners, which application was denied. *Held*, that an order could not be granted to stand for the consent of the property owners

- alone; that the order must have the statute effect or none, and that, so limited, it would not be the order which the statute authorized. *Id.*
8. *It seems* the said act of 1880 may stand as an authority for the construction of an underground street railroad upon condition of the assent of the city authorities and the owners of half the abutting values, and rejecting all the provisions for the appointment of commissioners whose orders shall be a substitute. *Id.*
- 9 In this state and in Vermont a railroad corporation by omitting to perform a duty imposed upon it by its charter does not, *ipso facto*, and, in the absence of words in the charter making such non-compliance a limitation upon the original grant of power, lose its corporate character; to dissolve the corporation there must be a judicial proceeding and judgment declaring the forfeiture. *Day v. O. and L. C. R. R. Co.* 129
10. Where a railroad corporation is authorized to lease the roads of other similar corporations it may, in the absence of any statutory limitation, lease a road operated in and under the laws of another state unless the law of that state forbids. *Id.*
11. A corporation organized under the General Railroad Act has power under the act of 1839 (Chap. 218, Laws of 1839), to contract "with any other railroad corporation" for the use of its road in any manner not "inconsistent with the provision of the charter" of such other corporation. *Id.*
12. By act of the legislature of Vermont, passed in October, 1872, the L. V. E. R. R. Co., was created to build a railroad between points specified. The act declared that: "If said corporation shall not within ten years from the approval of this act commence the construction of said railroad, then said corporation shall be dissolved." The road was not constructed within ten years, but was thereafter built under an agreement between said corporation, the defendant, the O. & L. C. R. R. Co., and other parties, and was leased to defendant. In an action by holders of certain bonds issued by defendant, among other things, to restrain it from carrying out the provisions of the lease, on the ground, among others, that the L. V. E. R. R. Co., by its omission to commence the construction of its road within the time prescribed, lost power to do a corporate act and its existence ended, *held*, that non-compliance with the requirement did not of itself work a dissolution of the corporation. *Id.*
13. It was provided in and by the said agreement that the L. V. E. R. R. Co., should issue so many of its first mortgage bonds, not exceeding a sum specified, as should be sufficient to construct its road; that these should be purchased by the parties to the agreement, other than the two corporations, and defendant agreed when the road was completed to take a lease of it on terms and conditions specified; after the completion of the road a lease was executed as agreed. By the terms of the lease defendant agreed to equip, maintain and operate the demised road as a part of its line, to pay taxes assessed thereon and certain other expenses, and to pay at maturity the principal and interest of the bonds; also, that the whole gross earnings of the demised road should be used and applied, first, to pay the interest accruing, and second, for the creation of a sinking fund for the payment of the principal of the bonds. *Held*, that the agreement and lease were within the power of the two corporations to make and were valid. *Id.*
14. The bonds held by plaintiffs were "income mortgage bonds" issued by defendant under a special act passed in 1880 (Chap. 73, Laws of 1880). Only the principal of these bonds was secured by the mortgage, the payment of interest was subject to the condition that "the net earnings of the railroad and other property of the company for each period," *i. e.*, each year, should be sufficient to pay

it; the amount of net earnings for each period to be determined by defendant's board of directors, by the coupons, the company promised to pay the sum named, "or so much thereof as its net earnings for the year then ending, according to the terms of the bond, will pay." The property mortgaged included all the property, franchise, income and profits, and all "privileges, rights," etc., and all rolling stock and other property "now owned, or hereafter to be owned, or acquired by said company." By the terms of the mortgage it was made subject to the right of the mortgagor "to retain the free and uncontrolled use, enjoyment, possession and management" of the mortgaged property, so long as no default was made in payment, in accordance with the terms of the bonds. The mortgage stated that it was given primarily to secure certain bonds described as "first consolidated mortgage bonds of the company," and secondarily the payment of the principal but not the interest of the "income mortgage bonds." It was also further provided that whenever the mortgagor acquired any franchises, or "property or interests of any name or nature, for the use of or in connection with its railroad," they should be held subject to the lien of the mortgage. It was claimed on behalf of plaintiffs that the income of defendant was charged with the payment of plaintiffs' bonds and could not be applied upon any contract subsequently entered into until the charge was extinguished; that the net earnings were insufficient to meet the accruing interest on the income bonds, and if diverted for the purpose of carrying out the lease would be absorbed. *Held*, that, so far as the interest was concerned, plaintiffs were simply contract creditors, having no lien, or right other than to have it paid out of the proper fund, *i. e.*, "the net earnings;" that the power of the company to change the condition of the road by additions, extensions, or improvements consistent with the purposes of its incorporation, was not restricted by the provisions referred to; that the

parties contemplated a line of active and efficient railroad, managed in the usual manner according to the discretion of defendant's directors, not one in suspense or liquidation; and that, therefore, the directors had the right to use the earnings of the corporation for such improvements or other lawful purposes in its business as they might think best, and plaintiffs were not entitled to maintain the action. *Id.*

15. Under the general railroad act (Chap. 140, Laws of 1850) the mere filing of articles of association does not constitute a corporation *de jure*. There must be a performance of the conditions precedent, *i. e.*, a stock subscription of at least \$1,000 for every mile of railroad proposed to be constructed, and a payment thereon of ten per cent in good faith and in cash. *Furnham v. Benedict*. 159

16. Where, therefore, the subscriptions to the capital stock of a proposed railroad corporation were less than the amount required, and the subscribers paid no portion of their subscriptions in cash, but some of them gave their notes for ten per cent of their subscriptions and others gave checks; some upon banks in which they had no accounts or deposits, it being understood between them that the notes and checks were not to be collected but were to be returned, and three of their number, who were named as directors in the articles of association, made and annexed to said articles an affidavit as required by the act, to wit, that the amount of stock had been subscribed and ten per cent in good faith paid thereon in cash; which articles, with the affidavit, were filed in the office of the secretary of state. *Held*, that no corporation was in fact organized. *Id.*

17. Under the town bonding act of 1869 (Chap. 907, Laws of 1869) the existence of a railroad corporation having power to issue stock or bonds, and to construct the road to be aided, lies at the foundation of the power to issue the municipal bonds. *Id.*

18. Accordingly, *held*, that bonds of a town, issued for the stock of a pretended corporation fraudulently organized as above stated, were invalid save in the hands of *bona fide* holders. *Id.*
19. The articles of association were filed in 1870; no movement was made to begin the construction of the road within five years thereafter as required by the act of 1867 (Chap. 775, Laws of 1867). *Held*, that, assuming the organization had a legal existence as a corporation, and that the bonds were lawfully issued and delivered to it, the default in beginning the construction caused its corporate powers to cease and terminate, and deprived the stock issued to the town of any value; and, therefore, that as the consideration for the bonds had failed they were void except in the hands of *bona fide* holders. *Id.*
20. Also, *held*, that an action was maintainable on behalf of the town, by its supervisor, to recover damages against one of the persons who made the false affidavit, and, who, with full knowledge of the fraud, had instigated, and as attorney conducted, the proceedings for bonding the town, and, having, in the character of an officer of the pretended corporation, obtained possession of the town bonds, after the five years had expired for beginning the construction of the road, had sold the bonds to *bona fide* holders, who purchased in reliance upon the representations of defendant, that the bonds were good and valid securities, and thus had rendered the town liable thereon. *Id.*
21. *It seems*, the fact that the persons signing the petition for bonding the town were well acquainted with the facts relating to the organization of the pretended corporation, would not affect defendant's liability in such an action; as, by procuring the town to be bonded, the petitioners not only imposed a burden on their own property, but on that of other taxpayers who did not sign or approve of the scheme, and who were at liberty to contest the validity of the bonds, until by defendant's action the town lost the right to avail itself of this defense. *Id.*
22. Also, *held*, that the act of 1875 (Chap. 598, Laws of 1875), passed after the forfeiture and before the negotiation of the bonds by defendant, did not cure the forfeiture; that the act only applies to a default in failing to complete the road within ten years. *Id.*
23. Also, *held*, the fact that defendant accounted to the pretended company for the proceeds of the bonds was not a defense. *Id.*
24. *It seems*, that immediately on the negotiation of the bonds a cause of action accrued in favor of the town, either in the nature of an action of trover for the face of the bonds, or as for money had and received, for the money realized by him on the sale. *Id.*
25. Also, *held*, that defendant's liability was not affected by an act passed in 1880 (Chap. 577, Laws of 1880), purporting to release the company from the forfeiture of its charter by reason of its failure to begin the construction of the road within five years; that the said act did not have the retroactive effect to take away a right of action which accrued in 1875. *Id.*
26. *It seems*, the act last mentioned is violative of the constitutional provision (State Const. art. 3, § 18), prohibiting the legislature from passing any local or private act granting to any corporation or association the right to lay down railroad tracks. *Id.*
27. Defendant delivered to one L., at a station on its road, a platform car with knowledge that it was to be used in the transportation of lumber over its road. Upon the sides of the platform of the car were iron sockets for stakes or standards, which were necessary in order to load the car. Stakes were not furnished, it being the practice of defendant to furnish lumber cars without stakes, which were supplied by the ship-

pers. L. put a stake in each of the sockets and loaded the car with lumber under the direction of defendant's station agent. The car was attached to a freight train, upon which plaintiff was employed as a brakeman. In going around a curve, at a high rate of speed, one of the stakes broke, the lumber and plaintiff, who was upon it at the time in the discharge of his duty, were thrown off and plaintiff was injured. In an action to recover damages for the injury it appeared that the stake was made of soft, poor wood, and was decayed, spongy and unsound, which was apparent on inspection. It did not appear that defendant had made any rules or directions as to the inspection of such cars, and the station agent had simply general directions to see that everything was in order and to correct anything he saw out of the way; if the conductor or brakeman saw a defect they were to report it to the station agent. *Held*, that the stakes were necessary appliances, forming part of the car, and defendant was chargeable with negligence in failing to exercise proper care that suitable and proper ones were furnished; also, that defendant's practice or custom was no defense, as it merely showed it had chosen to delegate to shippers a duty it should have performed itself, and therefore, defendant was liable. *Bushby v. N. Y., L. E. & W. R. R. Co.* 874

28. Defendant's road passes east and west through the city of B. with two tracks; the south track being used for eastward bound trains and the north for those going west; the space between the tracks is about seven feet. Plaintiff, who was perfectly familiar with the location and the use ordinarily made of the two tracks, was walking, in the daytime, very rapidly north along the center of a highway running north and south, intersecting the railroad. A freight train headed east was standing on the south track; the train was divided at the crossing, leaving a space of about twenty feet for passage on the street. Plaintiff passed through this open space, and just as he

stepped upon the north track, was struck by an engine going west thereon and was injured. In an action to recover damages for the injury, it appeared that when plaintiff reached the middle of the space between the two tracks he could have seen a train approaching from the east within a half mile of the crossing. Instead of looking in that direction he looked to the west and stepped immediately in front of the engine. *Held*, that plaintiff was guilty of contributory negligence; that the moment he crossed the south track it was his duty to look to the east, from which direction he had reason to believe any train on the north track would approach the crossing, and his omission to do so was a bar to a recovery. *Young v. N. Y., L. E. & W. R. R. Co.* 500

29. It appeared that a brakeman of the freight train was standing in the space between the cars, to recouple them when he should be signalled so to do. It did not appear that plaintiff knew the person was a brakeman, or supposed he was there to warn travelers, or that he owed him any duty whatever, or that plaintiff in any way relied upon the brakeman for protection, or was lulled into security by the absence of any warning. *Held*, the fact that the brakeman gave no warning did not relieve plaintiff from the charge of negligence. *Id.*

RAPALLO (CHARLES A.).

Proceedings on death of. 685

REAL ESTATE.

See EQUITABLE CONVERSION.
PUBLIC LANDS.

RECEIVER.

— *Where order appointing receiver under a New Jersey Statute providing for appointment of receiver*

"when any corporation shall be dissolved" was proved, held, that in absence of proof that the order was an interlocutory one or of some other law under which receivers might be appointed which was consistent with life of corporation, action was not maintainable in name of corporation.

See *M. L. & T. Co. v. Clair (Mem.)*.

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RECORD

1. *It seems* that where the record on appeal in a criminal action from a judgment of a court of general jurisdiction discloses upon its face that the court had no jurisdiction, or that the constitutional method of trial by jury was disregarded, or that there was some other fundamental defect in the proceeding which could not be waived or cured, it is the duty of the appellate tribunal to reverse, although the question was not formally raised in the court below and is not presented by any ruling or exception on the trial. *People v. Bradner*. 1

2. The record herein stated that "defendant on arraignment pleaded not guilty," and that thereafter, by leave of the court, he withdrew his plea and moved to dismiss the indictment. The record then contained the decision of the court denying the motion; a statement of the proceedings and evidence on trial, which showed that defendant was present with his counsel and took part in the trial; also, the finding of a verdict of guilty. *Held*, it was to be inferred that all parties regarded the plea as withdrawn for the purpose of the motion only, and that it was reinstated when the motion was denied. *Id.*

3. While an appellate court under certain circumstances may permit a record not given in evidence below to be produced upon the argument, it is allowable only for the purpose of sustaining the judgment, never for the purpose of reversing it. *Dau v. Town of New Lots* 148

RECORDING ACT.

— When purchaser of premises on which is a mortgage to a trustee on record is chargeable with notice that a satisfaction of mortgage by the trustee was without authority and void.

See *McPherson v. Rollins*. 316

RELEASE.

A lease for a term of twenty-three years contained a covenant on the part of the lessee to build on the demised premises within six years from its date a building as specified, and in default of such erection it was declared that the estate granted should cease. If the building should be erected within the time specified and should be standing at the expiration of the term, the lease provided that the lessors would, at their option, either grant a new lease for a further term, or pay the fair value of the dwelling; the rent for the new term or the value of the building to be determined by appraisers, one to be selected by each party. In case of default by either party in nominating an appraiser the one nominated by the other was to select the other. In case of the disagreement of the appraisers they were to appoint an umpire, the decision of the majority to be final. Before the expiration of the six years the the lessor executed to S., assignee of the lessee, a release, which, after reciting the covenant to build, released S. therefrom, and declared that the lease should "in all its parts" thereafter be acted upon "the same as though such covenant had not been inserted therein;" also that the purpose of the release was to exonerate S., his heirs and assigns from all obligation arising from or growing out of the covenant. Before expiration of the term S. did erect upon the premises a dwelling-house of the description specified in the lease. In an action to compel a specific performance by the lessors, *held*, that the release discharged S. from any obligation to build, and if at the expiration of the lease no building erected under and as authorized by the provisions

of the lease had been standing on the premises, the defendant would neither have been bound to renew the lease or pay the value of any building. But *held*, that the right to build during the term was preserved, and S., having availed himself of it, was entitled to the exercise by the defendant of the option either to pay the appraised value or to renew the lease. *Smith v. Rector, etc.* 610

REVERSION.

All rights of property, of whatever nature, revert to the People when the owner dies intestate and there is a failure of heirs to take such property. In respect to the rights so acquired by the state there is no essential difference between real and personal property, although the doctrine of escheat applies only to legal estates and does not, in a strict sense, affect either equitable estates or personal property. *Johnston v. Spicer.* 185

RIPARIAN OWNERS.

1. Where a riparian owner saw the owner on the opposite side of the stream erecting a factory upon his premises and digging a race which she knew would return the water, diverted from the stream, to it at a point below her land. *Held*, that her omission to object in any way to the proposed diversion of the water, did not constitute an estoppel barring an action to recover for such diversion. *N. Y. Rubber Co. v. Rothery.* 310
2. An action is maintainable for such a diversion of the waters of a stream which materially diminishes the natural flow and, at times, takes substantially all of the water from the stream. *Id.*

SALES.

1. Where an executory contract for the sale of goods contains no provision as to the time when delivery

is to be made by the vendor, its legal effect is an agreement to deliver within a reasonable time, and in an action brought by him against the purchaser for failure of the latter to perform where by the terms of the contract payment is to be made upon delivery, plaintiff must allege in his complaint and prove upon the trial performance or offer to perform on his part within a reasonable time. *Pope v. T. H. C. and Mfg. Co.* 61

2. Where the complaint in such an action omitted to allege a tender of the goods in a reasonable time, and upon motion to dismiss the complaint because of the omission, plaintiffs did not offer to amend and no amendment was made at any stage of the trial or proof given showing that the tender was in a reasonable time. *Held*, that the denial of the motion was error, requiring a reversal. *Id.*
3. Also, *held*, the defect in the complaint was not waived by the failure to take the objection by demurrer or answer. (Code of Civil Pro. § 499.) *Id.*
4. Unless otherwise expressed in the contract, the vendor, on a sale of chattels, is bound to deliver them to the purchaser where they are at the time of sale, on performance by the latter of the terms of sale. *Gray v. Walton.* 254
5. At an auction sale by defendant of the furniture, etc., of a hotel, made on the premises, plaintiff purchased various articles on separate bids. It was announced by the auctioneer at the opening of the sale that the goods must be removed before the first of May, as the lease expired on that day. A bill of items was delivered to plaintiff, in which there was an overcharge as to one of the articles. This mistake was called to the attention of the auctioneer and plaintiff offered to pay the true amount, but the mistake was not corrected until May second, when plaintiff paid the bill to the auctioneer who paid the money over to defendant, but on calling at the hotel plaintiff was unable

to obtain the goods. In an action to recover their value *held*, that the terms of sale did not relieve defendant from the obligation to deliver, except on the contingency that the purchaser failed to complete the purchase before May first; that plaintiff was excused from making payment before that time, the delay having been occasioned by the neglect and default of the defendant in making the correction in the bill; that as the sale, although comprising distinct articles, purchased on separate bids, was treated by the parties as one transaction, plaintiff could not be held to have been in default as to any portion; that, therefore, plaintiff was entitled to recover; and that his measure of damages was the value of the goods on May second. *Id.*

6. Also, *held*, it was no answer to plaintiff's claim that he might have tendered the true amount and thus have entitled himself to a delivery before May first; that he was not bound to do this, and having offered to comply with the terms of sale, was not in default. *Id.*

7. Where, before the time of delivery fixed by a contract of sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods, and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time and is entitled to bring an action immediately for the breach, without tendering delivery; it is not necessary for him to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract, after the vendor has acted upon it, and, by sale of the goods to other parties, changed his position. *Windmuller v. Pope.* 674

8. The ordinary rule of damages in such an action is the difference between the contract price and the market value of the property at the time and place of delivery. *Id.*

— Where vendor notifies vendee

that he will not fulfill contract for sale of goods, the vendee is not required to make any demand or serve notice to deliver before suit for breach of contract.

See Robinson v. Frank (Mem.). 655

See JUDICIAL SALES.

SHIPPING.

1. In the performance of the duty imposed by maritime law upon the owners of a vessel, of rendering such care and medical aid to seamen employed thereon as circumstances will admit, the master stands as the agent and representative of the owners, and his negligence is theirs. *Scarff v. Metcalf.* 211

2. A mate, although an officer, is a seaman; and while both he and the master are fellow servants of the owner, they are not such in respect to the owner's duty to the seamen which the master performs. *Id.*

3. In an action against the owners, therefore, for neglect of the master in the performance of such duty, it is not a defense that the neglect was that of a fellow servant. *Id.*

4. Where there is a charter of a vessel the general owner still is responsible to the seamen for the performance of said duty, unless there has been an actual demise of the vessel, such as to take from the owners all possession, authority and control. *Id.*

5. Where, therefore, a vessel was sailed by the master, one of several joint owners thereof, under an arrangement that he should sail it on shares, pay for victualing, manning and furnishing supplies, the other owners having nothing to do therewith. *Held*, that this was not an actual demise, and that all the joint owners were liable to the mate of the vessel for damages sustained by reason of the neglect of the master to furnish and render to him necessary medical attendance and care. *Id.*

SOLDIERS' HOME.

1. The Soldiers' Home, incorporated under the act of 1876 (Chap. 270, Laws of 1876), is an "asylum," and its inmates are supported at public expense, within the purview of the provision of the state Constitution (art. 2, § 8), declaring that "for the purpose of voting no person shall be deemed to have gained or lost a residence * * * while kept at any alms-house or other asylum at public expense." *Silvey v. Lindsay*. 55
2. The fact of the presence in that institution of an inmate, therefore, does not constitute a test of his right to vote, and is not to be considered in determining that question; he must find the requisite qualifications elsewhere. *Id.*

SPECIAL PROCEEDINGS.

- A transcript of a Justice's Court judgment for \$310.89 was filed in the county clerk's office. After the expiration of five years a motion was made by plaintiff in the County Court for leave to issue execution. On the hearing of the motion defendant did not appear, but another person appeared to oppose and presented affidavits to the effect that he was the owner of the judgment, under and by virtue of an assignment executed by plaintiff's general agent. The matter was referred to a referee, who reported that plaintiff made an agreement in writing to sell the judgment, and that there was no fraud inducing it. The court, on hearing counsel for plaintiff and the contestant, the defendant not appearing, confirmed the report, denied plaintiff's motion with costs to the contestant. *Held*, that it was a special proceeding within the meaning of the Code of Civil Procedure (§ 1357), and that the order was appealable to the Supreme Court. *Ithaca Agr'l Works v. Eggleston*. 272

SPECIFIC PERFORMANCE.

1. This action was brought by a purchaser of real estate to recover back

the portion of the purchase-price paid by him on execution of the contract of sale on the ground that defendant inherited the property from C., who died within three years intestate, that the administration of his estate had not been closed and plaintiff would have to take the property, subject to the debts of the intestate, if any there should be after his personal estate was exhausted, also to the possibility of the discovery of a will within four years after the death which would govern the disposition and render a conveyance void. Defendant's answer admitted the execution of the contract set forth in the complaint, and as a counter-claim averred readiness and offer to perform on his part and tender of a deed, and asked for a specific performance. *Held*, that the case was brought within the provisions of the Code of Civil Procedure (§§ 501, 502) in reference to counter-claims, and upon establishing the facts alleged defendant was entitled to the affirmative relief sought. *Moser v. Cochran*. 35

2. Defendant's evidence showed, and the court found, the regular issuance of letters of administration, compliance with the statute respecting claims against the decedent, and payment of all debts before the time fixed for delivery of the deed, leaving a balance of personal property. At the time of this finding C. had been dead more than three and a half years. *Held*, that defendant was entitled to a specific performance. *Id.*
3. A bare possibility that a title may be affected by existing causes, which may subsequently be developed, when the highest evidence of which the nature of the case admits, amounting to a moral certainty, is given that no such cause exists, is not to be regarded as a sufficient ground for declining to compel a purchaser to perform his contract. *Id.*
4. A lease for a term of twenty-three years contained a covenant on the part of the lessee to build on the demised premises within six years from its date a building as

specified, and in default of such erection it was declared that the estate granted should cease. If the building should be erected within the time specified, and should be standing at the expiration of the term, the lease provided that the lessors would, at their option, either grant a new lease for a further term or pay the fair value of the dwelling; the rent for the new term or the value of the building to be determined by appraisers, one to be selected by each party. In case of default by either party in nominating an appraiser the one nominated by the other was to select the other. In case of the disagreement of the appraisers they were to appoint an umpire, the decision of the majority to be final. Before the expiration of the six years the lessor executed to S., assignee of the lessee, a release, which, after reciting the covenant to build, released S. therefrom, and declared that the lease should, "in all its parts," thereafter be acted upon "the same as though such covenant had not been inserted therein;" also, that the purpose of the release was to exonerate S., his heirs and assigns, from all obligation arising from or growing out of the covenant. Before expiration of the term S. did erect upon the premises a dwelling-house of the description specified in the lease. In an action to compel a specific performance by the lessors, *held*, that the release discharged S. from any obligation to build, and if at the expiration of the lease no building erected under and as authorized by the provisions of the lease had been standing on the premises, the defendant would neither have been bound to renew the lease or pay the value of any building. But *held*, that the right to build during the term was preserved, and S., having availed himself of it, was entitled to the exercise by the defendant of the option either to pay the appraised value or to renew the lease, and that plaintiff was entitled to the relief sought. *Smith v. Rector, etc.* 610

5. The judgment authorized defendant to appoint an appraiser to act with one appointed by plaintiff,

and in case of neglect so to do, provided that the appraiser named by plaintiff might select another to act with him in fixing the valuations and, when determined, required defendant either to pay the value of the building or execute a new lease. It was claimed here by defendant that an action for specific performance could not be maintained by plaintiff until after he had procured the valuation to be made in the manner specified in the lease. *Held*, that as the objection was not taken on the trial it was not available here. *Id.*

6. Also, *held*, the rule that a court of equity will not entertain an action for specific performance of an agreement to arbitrate did not apply, as the judgment did not compel the defendant to appoint an arbitrator, and the appraisers, when appointed, will be appraisers selected by the parties in precise accordance with their agreement. *Id.*

7. Also *held*, that defendant could not refuse to give a new lease and turn the plaintiff, for his remedy, to an action at law on the covenant. *Id.*

8. Also, *held*, that the judgment should be modified by incorporating a provision for the appointment of an umpire in the contingency mentioned in the lease. *Id.*

STATE.

1. All rights of property, of whatever nature, revert to the People when the owner dies intestate and there is a failure of heirs to take such property. In respect to the rights so acquired by the State there is no essential difference between real and personal property, although the doctrine of escheat applies only to legal estates and does not, in a strict sense, affect either equitable estates or personal property. *Johnston v. Spicer.* 185

2. The history of legislation in this state upon the subject of escheat

and the administration of the estates of persons dying intestate without heirs, given. *Id.*

3. By an ante-nuptial agreement between G. (the man) and E. (the woman), G. covenanted and agreed that, in case of his death without leaving lawful issue by the contemplated marriage, previous to the death of E., all of the real and personal property, of which he should die possessed, should belong to her. The parties intermarried, but had no children, and G. died intestate seized of certain real estate, upon which was a mortgage. E. died thereafter intestate leaving no lawful heir. In a controversy as to the right to the surplus money arising on foreclosure sale, *held*, that upon the death of G. the legal title to the real estate went to his heirs; but that by force of the marriage settlement, E. became the equitable owner, and a trust by implication arose in her favor; the heirs holding the title as a naked trust for her and subject to her right to be vested with it on demand; and that upon her death without heirs her interest and rights reverted to the state, and it was equitably entitled to the surplus. *Id.*

STATUTES.

It seems, the exercise by courts of a power to disregard a particular provision of a statute, on the ground that it is directory, not mandatory, should be with great caution. *Wuesthoff v. Germania Life Ins. Co.* 580

- Chap. 583, *Laws of 1880.*
- Chap. 140, *Laws of 1850.*
- Chap. 10, *Laws of 1880.*
- See In re N. Y. D. R. Co.*, 42.
- Chap. 370, *Laws of 1876.*
- See Silvey v. Lindsay*, 55.
- Chap. 413, *Laws of 1864.*
- See Keller v. Paine*, 83.
- Chap. 40, *Laws of 1848.*
- See Hollingshead v. Woodward*, 96.
- Chap. 218, *Laws of 1839.*
- Chap. 73, *Laws of 1880.*
- See Day v. O. & L. C. R. R. Co.*, 129.
- Chap. 140, *Laws of 1850.*
- Chap. 907, *Laws of 1869.*

- Chap. 775, *Laws of 1867.*
- Chap. 598, *Laws of 1875.*
- Chap. 577, *Laws of 1880.*
- See Farnham v. Benedict*, 159.
- Chap. 377, *Laws of 1885.*
- See Johnston v. Spicer*, 185.
- Chap. 399, *Laws of 1867.*
- Chap. 601, *Laws of 1874.*
- Chap. 300, *Laws of 1875.*
- See Walsh v. Mayor, etc.*, 220.
- Chap. 555, *Laws of 1864.*
- See People ex rel. v. Abbott*, 225.
- Chap. 490, *Laws of 1887.*
- See People ex rel. v. Board of Police*, 235.
- Chap. 410, *Laws of 1882.*
- 2 R. S. 74, § 27.
- See In re Page*, 266.
- Chap. 229, *Laws of 1879.*
- Chap. 287, *Laws of 1882.*
- Chap. 298, *Laws of 1850.*
- Chap. 145, *Laws of 1835.*
- 1 R. S. 505, § 19.
- See Ensign v. Barre*, 329.
- Chap. 493, *Laws of 1887.*
- People v. Driscoll*, 414.
- Chap. 456, *Laws of 1857.*
- Chap. 269, *Laws of 1880.*
- See People ex rel. v. Coleman*, 541.
- 1 R. S. 726, §§ 37, 38.
- See Livingston v. Tucker*, 549.
- Chap. 8, *Laws of 1864.*
- Chap. 72, *Laws of 1864.*
- Chap. 41, *Laws of 1865.*
- See Clark v. Board of Supervisors*, 553.
- Chap. 499, *Laws of 1885.*
- Chap. 534, *Laws of 1884.*
- Chap. 265, *Laws of 1848.*
- Chap. 397, *Laws of 1879.*
- See People ex rel. v. Squire*, 593.

See CODE OF CIVIL PROCEDURE.
CODE OF CRIMINAL PROCEDURE.
LIMITATION OF ACTIONS.
PENAL CODE.

STATUTE OF FRAUDS.

1. *It seems* an agreement by a third person with an out-going member of a firm to relieve him from and indemnify him against the firm debts, where no consideration passed to the promissor, cannot be enforced against him by a creditor of the firm. *Berry v. Brown*. 659
2. *It seems*, also, such an oral agreement is void under the statute of frauds. *Id.*

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STEAMSHIP COMPANIES.

1. As to whether, in the absence of a statutory requirement, a steamship company owes a duty to its passengers to provide a surgeon to care for them in case of sickness or accident, or as to whether having voluntarily assumed that duty its position becomes identical with that of a carrier upon whom the duty is imposed by law, *quære*. *Laubheim v. De K. N. S. M.* 228
2. Where by law or by choice the company has become bound to furnish such an officer, reasonable care and diligence in the selection of a person reasonably competent is all that is required, and it is liable only for a neglect of that duty. It is not compelled to select and employ the highest skill and longest experience. *Id.*
3. Accordingly *held*, that in the absence of evidence of any carelessness or negligence on the part of a steamship company in its selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon. *Id.*

STOCKHOLDER.

Under the provision of the General Manufacturing Act (§ 24, Chap. 40, Laws of 1848), declaring "that no suit shall be brought against any stockholder" of a company organized under said act "who shall cease to be a stockholder * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," whenever a stockholder shall be divested of his interest in or control over the affairs of the corporation, by actual dissolution thereof by formal judgment, or by a surrender of its corporate rights, privileges and franchises, the time begins to run, and at the end of two years therefrom the stockholder is no longer liable

for any debt of the corporation. *Hollingshead Woodward.* 96

STREETS.

See HIGHWAYS.

SUPERIOR COURT (BUFFALO).

An indictment was found in the Superior Court of Buffalo. It was claimed by defendant that, under the provision of the Code of Criminal Procedure, defining the jurisdiction of that court (§ 28), which declares that it may inquire "by a grand jury of all crimes committed in the city of Buffalo," and may "try and determine all indictments found therein, or sent there by another court, for a crime committed in that city," the said court had no jurisdiction. *Held*, untenable; that the grand jury was clothed with power to determine both the facts and the law, and as it did inquire and determine that the crime was committed in the city of Buffalo there was no way of reviewing its determination unless by motion to quash the indictment or to arrest judgment; that under the plea of not guilty the only question was as to defendant's guilt and the jurisdiction of the court to try that question. *People v. Dimick.* 13

SUPERVISORS.

In November, 1866, the board of supervisors of Saratoga county, acting under the authority conferred upon such board by the acts of 1864 and 1865 (Chaps. 8 and 72, Laws of 1864, chap. 41, Laws of 1865), passed resolutions providing for raising, by taxation, a portion of the bounty debt, and directing the county treasurer "to procure an extension of the time of payment of the residue." Similar resolutions were passed each year down to 1875, and the annual accounts of the county treasurer with the accompanying vouchers showed that he made new loans and issued

new obligations each year. In an action upon two notes given by the county treasurer to plaintiff for money loaned which, upon their face, purported to have been issued in pursuance of said resolutions, it appeared that said officer had fraudulently overissued notes to a large amount, and that plaintiff was, with the exception of one year, a member of the board of supervisors from 1868 to 1875, and chairman of the board for several years. There was no proof that at the time the money was borrowed it was not needed for the purposes specified in the resolutions, or that it was misappropriated. *Held*, the presumption was that the county treasurer actually borrowed this money, as authorized, and applied it to the uses of the county; that the fact that plaintiff was a member of the board did not make him chargeable with knowledge of the wrongs perpetrated by the county treasurer; but even if so chargeable, this would not constitute a defense. *Clark v. Suprs.* 558

--- Action maintainable on behalf of town by its supervisor, to recover damages against one aiding in fraudulent organization of railroad corporation and in obtaining town bonds which he has transferred to bona fide holder and so made the town liable thereon.

See Furnham v. Benedict. 159

SURROGATE.

1. A surrogate who, as such, receives the money of private individuals, is not absolutely responsible therefor; he is only responsible for good faith and reasonable diligence. *People ex rel. v. Paulkner.* 477
2. Where, therefore, pursuant to an order of the court, surplus money, arising on foreclosure sale of land belonging to an intestate's estate, was paid over to a surrogate, and was by him deposited in good faith with a private banker in good standing and credit, doing a general banking business, pending proceedings to determine the parties entitled thereto, and before the

termination of such proceedings the banker failed and his estate proved to be largely insolvent. *Held*, it appearing there was no negligence on the part of the surrogate, that the sureties on his official bond were not liable for the loss. *Id.*

SURROGATE'S COURT.

A citation was issued by the surrogate of the county of New York to the widow and next of kin of an intestate, notifying them of an intended application by the public administrator for letters of administration. Upon the day and hour named in the citation, the counsel for the widow and next of kin appeared before the surrogate to oppose; but there was no appearance on the part of the public administrator. Said counsel remained in court until after the second call of the calendar and was then informed by the surrogate that there was no such application on the calendar. No application was made on that day, but subsequently, and without notice to said counsel and in his absence, the application was made and granted. *Held*, that the order was void; that no order having been made on the return day of the citation, either adjourning the hearing or determining the matter, the surrogate lost jurisdiction to proceed further, without either due service of another citation or a voluntary appearance of the widow and next of kin. *In re.* *Page.* 266

TAXES.

See ASSESSMENT AND TAXATION.

TENDER

A mortgage upon real estate the city of Brooklyn contained a provision requiring the mortgagor to pay all taxes, charges and assessments on the premises, and in default thereof the mortgagee was authorized to pay the same "with any expenses attending," and any

amount so paid was made a lien upon the premises. In an action to foreclose the mortgage it appeared that there were numerous taxes and assessments charged upon the premises which the mortgagor did not pay, some of which were illegal; that the mortgagee employed an expert to investigate and determine what were legal and to see that proper deductions were made for the illegal charges, agreeing to pay him twenty-five per cent of the amount he might succeed in having deducted. The mortgagee paid the legal liens and the percentage so agreed upon. *Held*, that the latter was a proper item of expense, and when paid became a lien upon the mortgaged premises; and that a tender which did not include such item was insufficient. *Eq. L. As. Soc. v. Von Glahn.* 637

TOWNS.

— *Action maintainable on behalf of town by its supervisor to recover damages against one aiding in fraudulent organization of railroad corporation and in obtaining town bonds, which he has transferred to bona fide holders, and so made the town liable thereon.*

See Furnham v. Benedict. 159

See BROOKHAVEN (TOWN OF).

TOWN BONDING.

1. Under the town bonding act of 1869 (Chap. 907, Laws of 1869) the existence of a railroad corporation having power to issue stock or bonds, and to construct the road to be aided, lies at the foundation of the power to issue the municipal bonds. *Furnham v. Benedict.* 159

2. Accordingly, *held*, that bonds of a town, issued for the stock of a pretended corporation fraudulently organized, were invalid save in the hands of *bona fide* holders. *Id.*

3. The articles of association were filed in 1870; no movement was made to begin the construction of the road within five years there-

after as required by the act of 1867 (Chap. 775, Laws of 1867.) *Held*, that, assuming the organization had a legal existence as a corporation, and that the bonds were lawfully issued and delivered to it, the default in beginning the construction caused its corporate powers to cease and terminate, and deprived the stock issued to the town of any value; and, therefore, that as the consideration for the bonds had failed they were void except in the hands of *bona fide* holders. *Id.*

4. Also, *held*, that an action was maintainable on behalf of the town, by its supervisor, to recover damages against one of the persons who made a false affidavit as to a compliance with the requirements of the general railroad act (Chap. 140, Laws of 1850), and, who, with full knowledge of the fraud, had instigated, and as attorney conducted the proceedings for bonding the town, and, having, in the character of an officer of the pretended corporation, obtained possession of the town bonds, after the five years had expired for beginning the construction of the road, had sold the bonds to *bona fide* holders, who purchased in reliance upon the representations of defendant, that the bonds were good and valid securities, and thus had rendered the town liable thereon. *Id.*

5. *It seems*, the fact that the persons signing the petition for bonding the town were well acquainted with the facts relating to the organization of the pretended corporation, would not affect defendant's liability in such action; as by procuring the town to be bonded, the petitioners not only imposed a burden on their own property, but on that of other taxpayers who did not sign or approve of the scheme, and who were at liberty to contest the validity of the bonds, until by defendant's action the town lost the right to avail itself of this defense. *Id.*

6. Also, *held*, that the act of 1875 (Chap. 598, Laws of 1875), passed after the forfeiture and before the

- negotiation of the bonds by defendant, did not cure the forfeiture; that the act only applies to a default in failing to complete the road within ten years. *Id.*
7. Also, *held*, the fact that defendant accounted to the pretended company for the proceeds of the bonds was not a defense. *Id.*
8. *It seems*, that immediately on the negotiation of the bonds a cause of action accrued in favor of the town, either in the nature of an action of trover for the face of the bonds, or as for money had and received, for the money realized by him on the sale. *Id.*
9. Also, *held*, that defendant's liability was not affected by an act passed in 1880 (Chap. 577, Laws of 1880), purporting to release the company from the forfeiture of its charter by reason of its failure to begin the construction of the road within five years; that the said act did not have the retroactive effect to take away a right of action which accrued in 1875. *Id.*
10. *It seems*, the act last mentioned is violative of the constitutional provision (State Const., art. 3, § 18), prohibiting the legislature from passing any local or private act granting to any corporation or association the right to lay down railroad tracks. *Id.*
- of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor, taking title with notice of the restriction; and this, although the assignees of the covenantor are not mentioned or referred to. It is not necessary that the covenant should be one technically running with the land; it is sufficient that the purchaser has notice of it. *Id.*
8. N. was the owner of certain lands containing deposits of building sand and the sale of the sand constituted his only business. S. offered to purchase a small parcel of the land, but N. declined to sell on the ground that it would interfere with his business. S. agreed to purchase, covenanting not to sell any sand off from the parcel. N. thereupon sold and conveyed, his deed containing such a covenant on the part of the grantee. S. subsequently conveyed by warranty deed, to defendant, without covenants on the part of the latter, who, however, had notice before taking his deed of the covenant in the deed to his grantor. Defendant opened a pit on his land, sold sand therefrom and declared that he should continue to sell notwithstanding such covenant. *Held*, (ANDREWS and EARL, JJ., dissenting), that an action was maintainable to restrain such sale. *Id.*

TRADE.

1. A covenant in restraint of trade is valid if it imposes no restriction upon one party, which is not beneficial to the other, and if it was induced by a consideration which made it reasonable for the parties to enter into; and the covenant will be enforced if a disregard thereof by the covenantor will work injury to the covenantee. *Hodge v. Sloan*. 244
2. Where a grantee binds himself by a covenant in his deed, limiting the use of the land purchased in a particular manner so as not to interfere with the trade or business

TRESPASS.

Plaintiff leased of defendant W. rooms on the second floor of a building in the city of New York, the lower story of which was occupied as a store. W. was also the owner of four adjoining buildings, the lower stories of which were occupied as stores and the upper by tenants occupying apartments. W., desiring to make certain alterations and improvements in his stores, procured the plaintiff and other tenants occupying rooms over the stores under separate leases, to sign an instrument, not under seal, whereby for an expressed consideration of one dollar, the receipt

whereof they acknowledged, they agreed to permit W. to make any alterations he might "deem necessary to carry out the plans and specifications in changing the house." No consideration was, in fact, paid. In an action to recover damages for alleged trespasses, in which the acts complained of were claimed by defendants to have been done in the making of the alterations referred to, plaintiff was nonsuited. *Held*, that the instrument was not valid as an agreement; that not being under seal it was not entitled to the common law or statutory presumption of consideration, and it being shown there was no consideration in fact paid, there was no presumption of an agreement to pay the consideration expressed; that in any event such an inference could only be drawn by the jury, not by the court; that considering the instrument as a license, it was not conclusive and binding against plaintiff as evidence, but could be explained, varied or contradicted by oral evidence, and could be revoked before it was acted upon; and evidence having been given by plaintiff that the license actually given and intended to be given related only to certain alterations which were completed before the commission of the trespasses complained of, also, that the license was revoked before acted upon, the ruling was error. *Fargis v. Walton*. 898

TRIAL.

1. Where the complaint in an action upon an executory contract for the sale of goods, which contained no provision as to the time of delivery, omitted to allege a tender of the goods in a reasonable time, and upon motion to dismiss the complaint because of the omission, plaintiffs did not offer to amend and no amendment was made at any stage of the trial or proof given showing that the tender was in a reasonable time. *Held*, that the denial of the motion was error, requiring a reversal. *Pope v. T. H. O. & Mfg. Co.* 61
2. Also, *held*, the defect in the complaint was not waived by the failure to take the objection by demurrer or answer. (Code of Civil Pro. § 499.) *Id.*
3. Where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant and the original defendant has been discharged, on payment into court of the amount of the demand, in pursuance of the provision of the Code of Civil Procedure (§ 820), the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a trial by jury. *Clark v. Mosher*. 118
4. Where, therefore, in such an action the trial judge empaneled a jury and submitted to them a single question of fact, but disregarded their finding and found the fact the contrary. *Held*, that a judgment entered pursuant to the findings and conclusions of the court was regular. *Id.*
5. The complaint herein alleged, in substance, that plaintiff purchased certain premises on a mortgage foreclosure sale, and paid the sum bid to the referee making the sale, who made the payments directed by the decree, and by order of the court deposited the surplus with the county clerk; that on or about February, 1874, defendant's collector received \$2,197.83 of such surplus from said clerk, and applied it upon a warrant held by him for the collection of an assessment on the premises for a local improvement, which assessment was subsequently adjudged to be illegal and void, and that \$1,499.98 of said sum so received "belonged to and was and still is the property of the plaintiff," and was so taken and received without his knowledge or consent. The only question of fact litigated upon the trial was as to the ownership of the surplus, and the only testimony given by plaintiff on this subject was that he paid a subsequent valid assessment for the same improvement. No offer was made by plaintiff to amend his complaint or to conform the pleadings

- to the proof. *Held*, that judgment was properly rendered dismissing the complaint, as the proof failed to show that plaintiff had any title to the surplus, which belonged to the mortgagor or the owner of the equity of redemption; that any equitable right plaintiff may have had to require the payment of the valid assessment out of the surplus could not be determined, as it was not presented by the pleadings, and the real party in interest was not represented in the litigation; that the provisions of the Code of Civil Procedure requiring objections as to defect of parties to be raised by answer or demurrer did not apply, as defendant was only required to plead to the cause of action stated in the complaint. *Day v. Town New Lots.* 148
6. Plaintiff leased certain premises, which had been occupied as a dwelling-house, to defendant, to be used as a public school. The requisite alterations in the interior were permitted by the lessor and the lessee covenanted to make them and also to surrender the premises at the expiration of the lease "in the same condition as they were at the execution of this lease, reasonable use and wear thereof as a public school and damages by the elements excepted." The lessees changed the dwelling-house into school rooms, removing partitions, etc. This lease was followed by three others in similar form, each executed before the termination of the preceding one. After the termination of the last lease and the surrender of the premises this action was brought, among other things, to recover damages for a breach of the covenants as to condition on surrender. Plaintiff proved that the premises were in good condition when leased, and that when surrendered the walls, floor and glass in the windows were broken, the basement filled with refuse and the sidewalk broken by dumping coal thereon, some of the balusters of the stairs gone, etc. *Held*, that defendant was not bound to restore the premises to their former condition as a dwelling-house; but that the evidence showed other damages, and the question as to whether or not they resulted from a reasonable use of the premises for school purposes was one of fact, and a submission of the same to the jury was proper. *McGregor v. Bl. Edn.* 511
7. Also, *held*, that plaintiff was not required to show the separate damage at the end of each term; it was sufficient to prove a breach of covenant, referable to one or more or all of the leases; also, that the delivery of each new lease was not a waiver, and did not estop plaintiff from claiming a breach of the covenant in the former one. *Id.*
8. The rule that where there has been an implied surrender of possession by a tenant, by acceptance of a new lease, he loses all rights dependent upon the continued existence and validity of the surrendered lease, applies simply to such rights as can exist only while the lease continues; it does not extinguish rights of action already accrued. *Id.*
9. Where one who ought to have been, but was not, joined as a party plaintiff in an action dies before the trial, and the plaintiffs named fully own and represent the cause of action, the fact of such death may be proved in reply to a plea in abatement, setting up the non-joinder. *Groot v. Agens.* 688
- *When objection not taken on trial not available here.*
See Smith v. Rector, etc. 610
See CRIMINAL TRIAL.
- TRUSTS AND TRUSTEES.
1. Plaintiff's complaint alleged, in substance, that A. died seized of certain real estate, which he devised to his sons J. and F., subject to the limitation as to F. that if he should die without issue his share should go to J. and his heirs; that F. conveyed his interest to defendant, who subsequently induced C., plaintiff's mother, to marry F. by means of the false and fraudulent representations that F. had a fine

property so left to him that if he married and had an heir the land would go to the heir. The complaint further alleged that plaintiff was the only child of such marriage; that the real estate was partitioned between J. and defendant as the grantee of F., and defendant since then has occupied and still occupies and claims to own the part set off to him. The relief asked was that plaintiff be declared the owner of the portion so set off to defendant and be placed in possession thereof. On demurrer to the complaint *held*, that it set forth a good equitable cause of action and the demurrer was properly overruled; that defendant was bound by his representations and must be considered as holding the property as trustee *ex maleficio*; and so, should be held to make good the thing to plaintiff, who would have had the property had the representations been true; that it was immaterial that plaintiff was not living at the time the representations were made, as they were made in her favor and enure to her benefit; and that the question was not affected by the fact that plaintiff's mother was induced to agree to the marriage by purely mercenary considerations. *Piper v. Hoard*. 78

2. Ante-nuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts and will be enforced in equity according to the intention of the parties. In order to effectuate such intention courts of equity will impose a trust upon the property agreed to be conveyed, commensurate with the obligations of the contract. *Johnston v. Spicer*. 185

3. It is immaterial whether a trustee is appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired. *Id.*

4. By an ante-nuptial agreement between G. (the man) and E. (the

woman), G. covenanted and agreed that, in case of his death without leaving lawful issue by the contemplated marriage, previous to the death of E., all of the real and personal property, of which he should die possessed, should belong to her. The parties intermarried, but had no children, and G. died intestate seized of certain real estate, upon which was a mortgage. E. died thereafter intestate, leaving no lawful heir. In a controversy as to the right to the surplus money arising on foreclosure sale *held*, that upon the death of G. the legal title went to his heirs; but that by force of the marriage settlement, E. became the equitable owner, and a trust by implication arose in her favor; the heirs holding the title as a naked trust for her and subject to her right to be vested with it on demand; and that upon her death without heirs her interest and rights reverted to the state, and it was equitably entitled to the surplus. *Id.*

5. A judgment recovered against the trustees of a school district, upon a contract entered into by them on behalf of the district, binds them individually, and may be collected by execution out of their individual property. (Code Civ. Pro. §§ 1927, 1929, 1981; Laws of 1864, Chap. 555, tit. 13, §§ 6-11.) *People ex rel. v. Abbott*. 225

6. Where the action is defended, without any resolution of a district meeting, no obligation rests upon the district to indemnify the trustees for costs, charges and expenses until a district meeting shall have found in favor of the claim and voted that a tax be assessed and collected for its payment, or unless on appeal from a refusal of the meeting to vote a tax, it shall be decided that the account in whole or in part ought justly to be charged upon the district. *Id.*

7. Where, therefore, an action was brought against school trustees to recover the salary of a teacher, which was defended by them without direction or instruction of a district meeting, and judgment

was recovered against them, which was affirmed on appeal, *held*, that in the absence of any action on the part of the district at any district meeting, or application by the trustees to the county judge to have the costs and expenses allowed, a writ of *mandamus* was improperly issued directing the trustees to forthwith pay the costs embraced in the judgment, or deliver to the plaintiff in the action an order on the collector of the school district for the amount thereof. *Id.*

8. Where one receiving money in his own right is afterwards, by evidence or construction changed into a trustee, he may plead the statute of limitations as a bar in an action to recover the money. *Price v. Mulford*. 303

9. In 1868, W., of the firm of M. & W., was county treasurer. In July of that year he transferred in the name of his firm to his successor in office an obligation or certificate of indebtedness, which had been transferred to the firm, as security for a certain court fund which had come into his hands as treasurer. In the official book containing his account of court funds was an entry under date of January 1, 1868, stating the balance on hand to the credit of said fund and that the same was invested in said certificate. At that time the firm was indebted to W. and on the books of the firm the certificate was charged to W. on account of that debt. In an action brought in 1883 to charge the firm with the amount of said certificate on the ground that the money went to its benefit, in which M. alone appeared and defended, there was no evidence of any personal participation by him in any of the transactions and no charge of fraud was made or proved against him. *Held*, that the cause of action, if any, arose in 1868, and that the statute of limitations was a bar. *Id.*

10. D., for the purpose of making a provision for F., a daughter, and two grandchildren, conveyed to her certain premises, she executing to him a mortgage thereon, which stated that it was given as security,

among other things, for the payment to him or to the general guardian of plaintiff; one of the granddaughters of D., of the sum of \$50 annually for the benefit of plaintiff until she should arrive at the age of fifteen, and thereafter the further sum of \$100 until she should arrive at the age of twenty-one. The deed and mortgage were recorded. Thereafter D., at the request of F. and without consideration, executed a certificate of satisfaction of the mortgage which was recorded, and a memorandum was made in the margin of the record of the mortgage to the effect that it was discharged of record. Subsequently the premises were conveyed by F. for a full and valuable consideration, the grantee having no actual notice of the execution of the mortgage. In an action to foreclose the mortgage, *held*, that a valid and irrevocable trust was created thereby, and as the same had in no way been renounced by the *cestui que trust*, the discharge was in contravention of the trust and was therefore void. *McPherson v. Rollins*. 316

11. Also, *held*, that the grantees were chargeable with notice that plaintiff had a beneficial interest under the mortgage, and that the satisfaction thereof was an act not in the execution of the trust and was beyond the power of the trustee. *Id.*

VENDOR AND PURCHASER.

1. This action was brought by a purchaser of real estate to recover back the portion of the purchase-price paid by him on execution of the contract of sale on the ground that defendant inherited the property from C., who died within three years intestate; that the administration of his estate had not been closed and plaintiff would have to take the property, subject to the debts of the intestate, if any there should be after his personal estate was exhausted, also to the possibility of the discovery of a will within four years after the death which would govern the disposition and render a conveyance void. *Held*, that to entitle plaintiff

iff to relief it was necessary for him to show debts, and an insufficient personal estate left by C. *Moser v. Cochrane.* 85

2. The court excluded evidence on the trial offered by plaintiff that he was unable to procure a loan on the property and that lawyers, familiar with such questions, regarded a title deprived from an heir within the periods named in the complaint, not marketable. *Held*, no error; that the question as to the sufficiency of the title was for the court and the opinion of conveyancers was immaterial. *Id.*

- 3 Defendant's answer admitted the execution of the contract set forth in the complaint, and as a counterclaim averred readiness and tender of a deed and offer to perform on his part and asked for a specific performance. *Held*, that the case was brought within the provisions of the Code of Civil Procedure (§§ 501, 502) in reference to counter-claims, and upon establishing the facts alleged defendant was entitled to the affirmative relief sought. *Id.*

4. Defendant's evidence showed, and the court found, the regular issuance of letters of administration, compliance with the statute respecting claims against the decedent, and payment of all debts before the time fixed for delivery of the deed, leaving a balance of personal property. At the time of this finding C. had been dead more than three and a half years. *Held*, that defendant was entitled to a specific performance. *Id.*

5. A bare possibility that a title may be affected by existing causes, which may subsequently be developed, when the highest evidence of which the nature of the case admits, amounting to a moral certainty, is given that no such cause exists, is not to be regarded as a sufficient ground for declining to compel a purchaser to perform his contract. *Id.*

6. The contract called for a frontage of twenty-eight feet two inches "more or less," the deed tendered,

twenty-eight feet more or less; the same description of the property was given in both, bounding it on either side by the walls of adjoining tenements. *Held*, that in such a case quantity was not a material part of the description. *Id.*

See JUDICIAL SALES. SALES.

VESSELS.

See SHIPPING.

WAIVER.

— *Where acceptance of new lease not a waiver, or estopped from claiming, a breach of covenant in old lease.*
See McGregor v. Bd. of Education.
511

WARRANTY.

In an action upon a policy of life insurance the defense was a breach of warranty. The alleged breach was that an answer in the application to a question as to the age of the insured, was untrue. It appeared that the answer was written in by a general agent of the defendant; that the insured was a German, understanding the English language very imperfectly; that when asked his age he answered that he did not know, and when assured that it was necessary to be known he repeated his former statement; that the agent made some computation or estimate and entered his conclusion in the application, and that this was not read over to the insured after the answers were written in. No fraud was alleged or found. *Held*, that an estoppel *in pais* was fairly established which precluded defendant from setting up the falsity of the answer in avoidance of the policy. *Muller v. Phoenix Mut. L. Ins. Co.*
292

WATER-COURSES.

1. Where a riparian owner saw the owner on the opposite side of the stream erecting a factory upon his premises and digging a race which

she knew would return the water, diverted from the stream, to it at a point below her land. *Held*, that her omission to object in any way to the proposed diversion of the water, did not constitute an estoppel barring an action to recover for such diversion. *N. Y. Rubber Co. v. Rothery.* 310

2. An action is maintainable for such a diversion of the waters of a stream which materially diminishes the natural flow and, at times, takes substantially all of the water from the stream. *Id.*
3. A water-course, as defined in the law, means a living stream with defined banks and channel, not necessarily running all of the time, but fed from other and more permanent sources than mere surface water. *Jeffers v. Jeffers.* 650
4. Natural depressions, in land to which the surface water from adjoining lands naturally flows are not thereby made water-courses in the legal and technical sense of the word. *Id.*

WILLS.

1. The will of O'C., contained various devises and bequests to different parties, and also this clause: "I hereby release all claims or demands which I may have at my death against any person or persons named in this will." At the time of the execution of the will the testator was conducting, as counsel, a litigation for defendant; the latter was not named in the will. At the close of the will the testator revoked all former "wills and codicils." By a codicil, subsequently executed, which the testator described therein as the "first codicil to his last will," he released three persons named from all claims against them. Two of these were named in the will; one was not. Immediately following this was a provision giving to defendant, whom he described as his "faithful and honorable friend," all books, papers, etc., relating to the claim in litigation. In an action to recover for legal services rendered by the testator in said litigation

held, that defendant was not released from liability by the said provision of the will. *Stoane v. Stevens.* 122

2. The general rule that a will and codicil are to be taken and construed together as constituting one testamentary act, does not apply where anything appears in the instrument showing that the word "will" was not intended to cover or embrace the codicil. *Id.*
3. S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the use of the testator's wife during her life; after her death the rents and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint." The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted "from the sum bequeathed to such daughter in this section." The will also empowered the executors "for the purpose of carrying into effect" the will and the trusts therein created, to sell "in their discretion" any and all of the real estate. In an action for partition of certain real estate of an interest in which the testator died, seized, and which was included in said residuary clause, *held*, that an infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (§ 1538); that she never could take the real estate, and had no title thereto or interest therein as realty, but that the whole title vested in the ex-

cutors and trustees; that, construing all the provisions of the will together, the direction to sell the real estate was imperative, and there was, therefore, an equitable conversion thereof into personalty. *Delafield v. Barlow.* 535

4. The will of L. gave a life estate in two-twentieths of his property to his widow, the remainder over to his infant daughter M., in case she survived her mother; if not, then to certain other beneficiaries in the order named. In an action for partition of certain real estate of which said testator died seized, commenced during the minority of A., and wherein she was made a party defendant, the judgment directed a sale of the premises. The testator's widow was given the liberty to accept, and did accept, out of the proceeds of sale, a gross sum in lieu of her interest as tenant for life, and the balance of the purchase-money of the two-twentieths was directed to be paid into court, to be invested by the chamberlain of the city of New York, and, upon the death of the life tenant, the fund, "with all accumulations of interest, dividends or income," to be paid to M., if then living; if not, then to the beneficiaries entitled under the will to take. Upon coming of age M. petitioned that the accumulation be paid over to her on the ground that such accumulation was prohibited by statute (1 R. S. 726, §§ 37, 38), and that she was entitled thereto "as presumptive owner of the next eventual estate." *Held*, that the matter of the disposition of the fund was directly involved in the action and was *res adjudicata*; and, therefore, that the petition was properly denied. *Livingston v. Tucker.* 549

5. *It seems* that the directions for accumulation were proper, as the will did not contemplate any directions authorizing it, and as the income was paid off in advance out of the principal, when subsequently received, it was properly devoted to restoring said principal to the condition it would have been if it had not been thus depleted. *Id.*

6. Defendant issued a policy of insurance on the life of W., payable

to A., his wife. In case of her death before the death of the insured the policy provided that the amount of insurance "shall be payable to her children * * * or to their guardian, if under age." W., resided in New Jersey, where the policy was issued, and continued so to do up to the time of his death. He survived his wife and remarried. By his will he appointed his second wife guardian of his children by the first wife, who were infants. She, as such guardian, served on defendant notice and proof of the death of W., and of his first wife, and defendant thereupon paid to her the amount of the policy. The laws of New Jersey provide that a father may, by deed or will, appoint a guardian for his minor children (N. J. R. S. 664, § 1), but by another section (p. 762, § 48), provide that every testamentary guardian "shall, before he exercises any authority over the minor or his estate, appear before the Orphans' Court and declare his acceptance of the guardianship * * * and shall give bond * * * for the faithful execution of his office unless it is otherwise directed by the testator's will." The guardian at the time of receiving payment on the policy had not declared her acceptance of the guardianship or given a bond as required. In an action by the children to recover the amount of the policy, *held*, that the case was to be governed by the laws of New Jersey; that the giving of security was a necessary prerequisite to the exercise of any authority by the guardian over the estate of the ward; that the guardian, therefore, was not authorized to receive payment; and that such payment was not a defense to the action. *Wuesthoff v. Germania L. Ins. Co.* 580

7. The will was executed under seal. It was claimed that the statutory limitation did not apply, as that relates to a guardian appointed by will, while here the appointment was by deed. *Held* untenable; that the unnecessary addition of a seal did not change the character of the instrument or justify treating it as in part a will and in part a deed. *Id.*

ERRATA.

In *Sherry v. N. Y. C. and H. R. R. Co.* (104 N. Y., 657), at close of report of case, it should read "DANFORTH, J., reads for reversal and new trial. All concur. Judgment reversed," instead of "DANFORTH, J., reads for affirmance. All concur. Judgment affirmed."

In *People ex rel. v. Jones* (106 N. Y., 330), in third line of head-note "chap. 207" should read "chap. 201."

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